Supreme Court, U.S.
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No. 87-505

In The

Supreme Court of the United States

October Term, 1987

CHICK KAM CHOO, *et al.*,

Petitioners,

vs.

EXXON CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari filed September 21, 1987
Certiorari granted November 16, 1987

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RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
2/11/86	1	ORIGINAL COMPLAINT, for INJUNCTIVE RELIEF, filed.
2/11/86		SUMMONS (3) issued to defts.
2/26/86		RETURN OF SUMMONS ISSUED to the following, filed, jgm DK 2/27/86
	2	Joseph Blanks served personally on Feb. 17, 1986
	3	Benton Musslewhite served personally on Feb. 13, 1986
	4	Chick Kam Choo through Benton Musslewhite, served personally on Feb. 13, 1986.
3/ 7/86	5	RESPONDENTS' MOTION TO DISMISS, filed. ryb dkt'd 3/11/86 M/D 3/24/86, by clerk
3/31/86	6	Pltfs' OPPOSITION to defts' Motion to Dismiss, filed. db dkt'd 4/01/86
4/28/86	7	(NWB) ORDER, filed. Parties ntf'd. jr Hearing set for May 15, 1986, at 2:00 p.m. dkt'd 4/30/86
5/ 7/86	8	Petitioners' MOTION FOR SUMMARY JUDGMENT AND APPLICATION FOR PERMANENT INJUNCTIVE RELIEF, filed. jr M/D June 2, 1986, by counsel. dkt'd 5/13/86
5/15/86	9	Respondents' RESPONSE to Motion for Summary Judgment and Application for Permanent Injunctive Relief, filed. jr dkt'd 5/16/86

DATE NR. PROCEEDINGS

5/15/86 10 (NWB) INJUNCTION AND FINAL JUDGMENT, filed. Parties ntf'd. jr Chick Kam Choo and her attys, Benton Musslewhite and Joseph C. Blanks are permanently enjoined from prosecuting or commencing any causes of action or claims against Exxon Corp and/or Esso Tankers, Inc. in the courts of the State of Texas or any other state, and in particular Cause No. 84-00125 pending in the 270th District Court of Harris County, Texas, arising out of or related to the alleged wrongful death of Leong Chong. This Injunctive Order is binding upon and applies with equal force to defts, their agents, servants and upon those persons in active consent or participation with them. Pltfs will recover reasonable attys' fees as subsequently determined by the Court along with their costs. dkt'd 5/27/86

6/ 3/86 11 Defts Chick Kam Choo, Benton Musslewhite & Joseph C. Blanks' NOTICE OF APPEAL to Final Judgment entered May 15, 1986, filed.
Rec. 6/9/86 and Dkt'd 6/11/86 mac

6/ 3/86 12 Defts. Chick Kam Choo, Benton Musslewhite & Joseph C. Blanks REQUEST for Transcript of Proceedings, filed.
Dkt'd 6/11/86 mac

6/10/86 Filing & Docketing Fees both paid. (Rcpt. # 3-148908) mac

6/11/86 RECORD ON APPEAL consisting of All Original Papers (1 Vol.) forward to Court of Appeals. mac

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the ESTATE OF LEONG CHONG, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HAR, LEONG CHOY FONG and LEONG CHOY LAN	)	
vs.	)	C.A. No. H-78-477
EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	

PLAINTIFFS' ORIGINAL COMPLAINT

1. Plaintiffs are all resident citizens of Singapore.

2. Defendant, EXXON CORPORATION, may be served by serving its registered agent, Mr. Roy L. Trusty, 900 Bell Street, Houston, Texas 77002.

Defendant, ESSO TANKERS, INC., is a foreign corporation which is doing business in this State within the meaning of Article 2031(b), Revised Civil Statutes of Texas, and does not maintain a registered agent for service of process nor a regular place of business within this State. Said Defendant operates solely as the alter ego of Exxon Corporation, and may be served by serving the Secretary of State for forwarding to the Defendant at 1351 Avenue of the Americas, New York, New York 10020.

Defendant, EXXON INTERNATIONAL COMPANY, INC., is a foreign corporation which is doing business in

this State within the meaning of Article 2031(b), Revised Civil Statutes of Texas, and does not maintain a registered agent for service of process nor a regular place of business within this State. Said Defendant operates solely as the alter ego of Exxon Corporation, and may be served by serving the Secretary of State for forwarding to the Defendant at 1251 Avenue of the Americas, New York, New York 10020.

3. At all times material hereto, LEONG CHONG was a Jones Act Seaman who was entitled to all of the protections of the Jones Act as enumerated therein. As his Administratrix and/or Representatives, Plaintiffs bring this cause of action under 23 U.S.C. § 1916, without the necessity for prepayment of costs or the necessity of depositing security therefor.

4. This action is brought under the purview of 46 U.S.C. § 688, hereinafter referred to as the Jones Act, and for breach of the general maritime law of the shipowner's duty to maintain a seaworthy vessel. Plaintiffs would also show, in the alternative, that they are entitled to recover under the Death on the High Seas Act and the Wrongful Death Statutes of the State of Texas.

5. At all times material hereto, the deceased, LEONG CHONG, was a crew member of the vessel "ESSO WILHELM-SHAVEN". On or about the 24th day of March, 1977, LEONG CHONG was killed while in the course and scope of his employment aboard the vessel "ESSO WILHELM-SHAVEN".

6. The death of LEONG CHONG was caused solely by the negligence of the Defendants and/or the unseaworthiness of the aforementioned vessel, its master, agents, servants and employees. Plaintiffs would show that the negligence of the Defendants, their master, agents, servants and employees and/or the unseaworthiness of the aforementioned vessel was the sole proximate cause of the death of LEONG CHONG.

7. LEONG CHONG was born on the 12th day of January, 1940, and at the time of his death was a strong and healthy individual providing the sole means of support for his family. CHICK KAM CHOO is the widow of LEONG CHONG, and she has suffered damages and is entitled to be compensated by the Defendants for her issues (sic) in the following respects.

(a) The loss of financial support which she has suffered as a result of the death of her husband.

(b) The loss of the love, care, consortium, society, affection, attention, companionship, comfort, protection and personal guidance which she has suffered as a result of the loss of her husband.

(c) The loss of the monetary value of the household and domestic services which her husband rendered during his lifetime and, in all probability, would have continued to render through the duration of his life.

8. LEONG CHONG and CHICK KAM CHOO were the parents of four minor children. LEONG CHOY WAN was born on the 26th day of August, 1967; LEONG CHOY HAR was born on the 12th day of October, 1969; LEONG CHOY FONG was born on the 3rd day of January, 1972; and LEONG CHOY LAN was born on the 3rd day of January, 1972. CHICK KAM CHOO, in her capacity as legal guardian and next friend of the aforementioned children, would show that such children have been materially dam-

aged through the loss of financial support which their father rendered to them during his lifetime and, in all probability, would have continued to render to them until such time as they gain their majority. In addition, they are entitled to be compensated for the affection, companionship, comfort, protection, love, care, society, guidance and fatherly instruction which they have been deprived of through the untimely death of their father.

9. Furthermore, your Plaintiff, CHICK KAM CHOO, as Administratrix and/or as Representative of the ESTATE OF LEONG CHONG, deceased, brings this action for damages to which the Estate is entitled to recover for the physical pain and mental anguish suffered and sustained by the deceased from the time of the beginning of the physical condition which brought about his death to the time of his death.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that process issue to be served upon the Defendants in the form and manner prescribed by law, requiring the Defendants to appear and answer herein, that on final trial hereof Plaintiffs have judgment against Defendants in the sum of ONE MILLION DOLLARS, together with interest thereon from the date of the accident made the basis of this lawsuit, all costs of court, and all such other and further relief to which they may be entitled in the premises and to which the court believes them deserving, and for which they now pray.

Respectfully submitted,

FRIEDMAN AND CHAFFIN

ORIGINAL SIGNED BY
ROBERT A. CHAFFIN

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ATTORNEYS FOR PLAINTIFFS

PLAINTIFFS HEREBY REQUEST
A TRIAL BY JURY.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, ETC., ET AL.	)	Filed 3-26-79
VS.	)	CIVIL ACTION NO. H-78-477
EXXON CORPORATION, ET AL.	)	

MOTION OF DEFENDANTS FOR
PARTIAL SUMMARY PUDGMENT AND TO
DISMISS—FORUM NON CONVENIENS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Exxon Corporation and Esso Tankers, Inc., Defendants herein, and move this Court to enter an Order granting Partial Summary Judgment pursuant to Rule 56(d) of the Federal Rules of Civil Procedure dismissing Plaintiff's claim for relief under the Jones Act, 46 U.S.C.A. § 688, the Death on the High Seas Act, 46 U.S.C.A., § 761 *et seq.*, and under the General Maritime Law of the United States and further to dismiss this action under the doctrine of *forum non conveniens*, and for grounds thereof would show to the Court as follows:

I.

This case arises out of the death of a shipyard worker employed by Sembawang Shipyard Limited ("Sembawang") of Singapore, on March 24, 1977, in Singapore aboard the S/T ESSO WILHELMSHAVEN ("Vessel"), a vessel owned by Esso Tankers, Inc. ("ETI") and documented under the laws of the Republic of Liberia. The deceased shipyard worker met his death as the result of

being struck on the head by a piece of metal while engaged in repair work in the Vessel's lower engine room. At the time of his death he was under the supervision and control of Sembawang, which was performing repair work on the Vessel pursuant to a contract with Exxon Corporation, through its unincorporated division Exxon International Company ("EIC"), which managed the Vessel pursuant to a Marine Service Agreement. Sembawang is not a party to this action.

II.

The Jones Act is not applicable to this case and all claims thereunder should be dismissed for the following reasons:

1.

No employer-employee relationship, which is essential to recovery under the Jones Act, existed between Plaintiff's decedent and the Defendants.

2.

Plaintiff's decedent was not within the class of "seaman" entitled to recover under the terms of the Jones Act.

3.

The vessel was not in navigation at the time of the incident resulting in Plaintiff's decedent's death.

III.

The Death on the High Seas Act is not applicable to this case and all claims thereunder should be dismissed because it is undisputed that Plaintiff's decedent met his

death in the Republic of Singapore and not on the "high seas." DOSHA provides a wrongful death remedy only in situations where the deceased met his or her death on the high seas outside of the territorial water of any state or nation. *See, Mobil Oil Corp. v. Higginbotham,* — U.S. —, — S.Ct. —, 56 L. Ed. 2d 581 (1978).

IV.

The General Maritime Law of the United States is not applicable to this case and any claims being asserted thereunder should be dismissed. Because of the lack of substantial contacts between the occurrence giving rise to this action and the United States, the maritime law of the Republic of Singapore, rather than the maritime law of the United States is applicable herein on the basis of the choice of law criteria regularly employed in maritime cases of this nature. *Lauritzen v. Larsen,* 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953); *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368, *reh. den.,* 359 U.S. 962, 79 S. Ct. 795, 3 L. Ed. 2d 769 (1959). The alleged wrongful act that resulted in the death of Plaintiff's decedent took place in the territorial waters of the Republic of Singapore. The deceased was employed by a Singaporese business concern and engaged in ship repair activities in the Republic of Singapore. The courts of Singapore are accessible to the Plaintiff and provide her with several remedies for the alleged wrongful death of her decedent.

V.

This case should be dismissed under the doctrine of *forum non conveniens* because of the lack of substantial contacts between it and the United States and because a

dismissal on *forum non conveniens* grounds would best serve the convenience of the parties and the ends of justice. In support thereof, Defendant would show:

1.

Plaintiff's decedent met his death in Singapore.

2.

Plaintiff's decedent was a resident of Singapore.

3.

Plaintiff's decedent was employed by a Singaporese business concern engaged in ship repair activities in Singapore.

4.

The courts of Singapore are available to the Plaintiff.

5.

The law of Singapore controls the adjudication of this case.

6.

Almost all of the liability witnesses and all of the damage witnesses reside in Singapore or in Malaysia and are not amenable to the process of this Court.

7.

The cost of obtaining the testimony of willing witnesses will be substantial.

8.

Exxon International, pursuant to its contract with Sembawang Shipyard, Ltd., is to be held harmless by

the Shipyard for any injuries sustained by employees of the Shipyard or its sub-contractors pursuant to contract. Defendant is unable to obtain personal jurisdiction so as to implead either the shipyard or the employer of the deceased to enforce its rights of indemnity in this forum.

9.

The United States has no interest in the resolution of this matter.

10.

The Plaintiff will not be significantly inconvenienced by dismissal.

WHEREFORE, PREMISES CONSIDERED, Exxon Corporation and Esso Tankers, Inc., Defendants herein, respectfully request that the Court enter an Order granting Partial Summary Judgment and dismissing the Plaintiff's claims under the Jones Act, the Death on the High Seas Act and the General Maritime Law of the United States and dismiss this action on *forum non conveniens* grounds and grant the Defendants whatever other relief to which they are justly entitled.

Respectfully submitted,

/s/ James Patrick Cooney
James Patrick Cooney
Attorney-in-Charge for Defendants
3710 One Shell Plaza
Houston, Texas 77002
713/224-8380

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on Plaintiff's attorney, Robert A. Chaffin, Esq. of Friedman & Chaffin, 3500 Travis, Houston, Texas 77002, by placing a copy of same in the United States Certified Mail, Return Receipt Requested, in a properly addressed envelope with adequate postage thereon.

This 26th day of January, 1979.

/s/ James Patrick Cooney

Of Royston, Rayzor, Vickery
& Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DISTRICT

CHICK KAM CHOO, Etc. et al., Plaintiff	)	
vs.	)	C. A. NO. H-78-477
EXXON CORPORATION and ESSO TANKERS INC., Defendants	)	

BRIEF OF EXXON CORPORATION
and ESSO TANKERS INC. IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT
AND TO DISMISS UNDER THE DOCTRINE OF
FORUM NON CONVENIENS

Statement of the Case.

This is an action seeking to recover damages for the wrongful death of Leong Chong, a Singapore shipyard worker who met his death on March 24, 1977, in Singapore, as the result of being struck on the head by a piece of metal while engaged in shipyard repair work aboard the S/T ESSO WILHELMSHAVEN ("Vessel"), while the Vessel was undergoing repairs ("Repairs") at the Shipyard of Sembawang Shipyard Ltd. ("Sembawang") in Singapore. (The above deseribed incident will be referred to herein as the "Accident.") Plaintiff seeks to recover under the Jones Act, 46 U.S.C.A. § 688; the Death on the High Seas Act, 46 U.S.C.A. § 761 *et seq.;* the Texas Wrongful Death Statute, Art. 4671, *et seq.*, V.A.T.S., as amended, (Supp. 1978); and the general maritime law of the United States. Defendants Exxon Corporation and Esso Tankers

Inc. have filed a Motion for Partial Summary Judgment and to dismiss under the doctrine of *forum non conveniens.*

The various affidavits filed in support of Defendants' Motions will be cited to herein as "(Berner Aff., ¶ —)" etc. The Notes of Evidence of the Coroner's Inquest held in Singapore regarding Plaintiff's decedent's death will be cited to herein as "(Notes of Evidence, p. —)". Defendants' Interrogatory Answers will be cited to herein as "(Interrogatory Answer No. —)." An Affidavit identifying relevant contracts and business records will be cited to herein as "(Exxon Rec. Aff.)".

Facts.

The Vessel is a steam turbine tanker built in Germany in 1970 and documented under the laws of the Republic of Liberia. (Berner Aff. ¶ 8.) She is of 113,751 gross tons, and has a length of approximately 1,141 feet and a draft of approximately 65 feet. At the time of the Accident and at all times since then, the Vessel has been owned by Esso Tankers Inc. ("ETI"), a corporation existing under the laws of the Republic of Liberia, which is a 100% indirectly owned affiliate of Exxon Corporation. (Interrogatory Answer No. 1) At the time of the Accident and at all times since then the Vessel has been managed by Exxon International Company ("EIC"), pursuant to a Marine Service Agreement between ETI and EIC, the latter being an unincorporated division of Exxon Corporation. (Exxon Rec. Aff.) At all material times the Vessel's officers and unlicensed crew were Italian nationals hired for ETI. (Berner Aff. ¶ 8) The Vessel never called in the United States prior to the Accident. Since that time it has made

one visit to St. Croix in the Virgin Islands in January, 1979. (Exxon Rec. Aff. Ex. IV).

The Vessel was in the Sembawang Shipyard in March of 1977 for drydocking and repair pursuant to a Repair Contract between EIC and Sembawang. The Vessel entered the Sembawang Shipyard on March 2, 1977 and entered drydock on March 3, 1977. On March 10, 1977, the Vessel left drydock and was shifted to Sembawang Berth No. 12 for additional repairs. Repairs were finally completed and the Vessel proceeded to sea on March 31, 1977. (Berner Aff., generally)

Plaintiff's decedent, Leong Chong, was employed as a steel worker by Sembawang. On March 24, 1977, the deceased was sent to the lower engine room of the Vessel to carry out certain repairs. While in this area the deceased was struck on the head by a valve spindle or other piece of metal and sustained a fractured skull and contusion to the brain and died as a result. At the time of the Accident, the deceased was under the direct supervision and control of Sembawang. The valve spindle that struck the deceased allegedly fell through an access hole from the Vessel's machine shop. The eye witnesses to the Accident were: Foo Chek Kow, an apprentice pipe worker employed by Sembawang, who resides at 62-G Andrew's Avenue, Singapore 27 (Notes of Evidence, p. 1); Ong Eng Chuan, a steel worker employed by Sembawang, who resides at No. 16, Tract 7, Mandai Road, Singapore (Notes of Evidence, p. 12); and Prezioso Nicola, a member of the crew of the Vessel, whose permanent address is Corsa Umberto 4/D, 70056 Molfetta, Italy (— Aff., Exhibit —).

Argument and Citation of Authority.

A. The Jones Act is not applicable.

"By the express terms of the Jones Act an employer-employee relationship is essential to recovery." *Spinks v. Chevron Oil Company*, 507 F. 2d 216, 224 (5th Cir. 1975),

• • •

E. *This case should be dismissed under the doctrine of forum non conveniens.*

The doctrine of *forum non conveniens* has long been recognized by American admiralty law.[10] Under the doctrine of *forum non conveniens*, the refusal of a district court to entertain a suit in admiralty is within its sound discretion, "that is, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law. . . . The ultimate inquiry is whether the retention of jurisdiction by the district court would best serve the convenience of the parties and the ends of justice." *Mobil Tankers Company v. Mene Grande Oil Company*, 363 F. 2d 611 (3d Cir. 1966), *cert. denied*, 385 U.S. 945. The burden to establish good cause for dismissal is upon the defendant and unless the balance is strongly in favor of the defendant, the plaintiff's choice should rarely be disturbed. *Menedez Rodriquez v. Pan American Life Insurance Co.*, 311 F. 2d 429,

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10 *See, The Belgenland*, 114 U.S. 355, 5 S. Ct. 860, 29 L. Ed. 152 (1885); *Canada Melting (sic) Co. v. Paterson Steamships*, 285 U.S. 413, 52 S. Ct. 413, 76 L. Ed. 837 (1982).

432 (5th Cir. 1962), *vacated on other grounds*, 376 U.S. 779, 84 S. Ct. 1130, 12 L. Ed. 2d 82 (1964).[11]

The seminal case in the modern development of the doctrine of *forum non conveniens* is *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). There the court held that the factors to be considered in determining whether a case should be dismissed on the basis of *forum non conveniens* were as follows:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The Court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress"

[11] In admiralty suits between two foreigners dealing with an incident controlled by the *communis juris*, that is, the common law of nations, or where a citizen of the United States is the plaintiff, the rule is that "jurisdiction should be taken unless to do so would work an injustice." *Motor Distributors v. Olaf Pedersen's Rediri A/S*, 239 F. 2d 463, 465 (5th Cir. 1956), *cert. denied*, 353 U.S. 938, *reh. den.* 353 U.S. 989; *Burt v. Isthmus Development Company*, 218 F. 2d 353 (5th Cir. 1955), *cert. denied*, 349 U.S. 922; *Poseidon Scheffahrt G.M.B.N. v. M/S NETUNO*, 474 F. 2d 203 (5th Cir. 1973). While defendant is of the view that this standard does not apply in cases arising out of occurrences which take place in the territorial waters of a particular nation so that the *communis juris* would not apply or which do not involve an American plaintiff, it is clear that this standard is met in this case on many grounds.

> the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. 330 U.S. at 508.509.

The *forum non conveniens* criteria of *Gulf Oil Co. v. Gilbert* have been held applicable to actions in admiralty.[12] Notwithstanding the apparent pre-eminence of the *Gulf Oil Company v. Gilbert* decision in the area of *forum non conveniens*, many courts have held that the criteria of *Lauritzen* "serve as an appropriate yardstick for a district court in deciding whether the United States courts

[12] *Paper Operations Consultants International Ltd. v. S.S. HONG KONG AMBER*, 513 F. 2d 667, 671 (9th Cir. 1975); *Poseidon Schiffahrt E.M.B.H. v. M/S NETUNO*, 474 F. 2d 203, 205, n. 5 (5th Cir. 1973); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499 (1st Cir. 1966); *Mobil Tankers Company v. Mene Grande Oil Company*, *supra*.

should accept or decline jurisdiction of a controversy which is essentially foreign." *Anastasiadis v. S.S. Little John*, 346 F. 2d 281, 283, (5th Cir. 1965), *reh. den.*, 347 F. 2d 823, *cert. denied*, 384 U.S. 920.[13]

Regardless of whether the *Gulf Oil Co. v. Gilbert* criteria, the *Lauritzen* criteria or a combination of the two are applied to the facts of this case, it is clear that a failure to decline jurisdiction will work an injustice. As demonstrated above, an analysis of the applicable *Lauritzen* factors present in this case establishes the absence of a sufficient nexus with the United States to justify the application of American law. This requires the conclusion not only that the law of Singapore is applicable in this case, but also that the courts of the United States do not provide a convenient forum.

A consideration of the traditional *forum non conveniens* criteria articulated in *Gulf Oil v. Gilbert* only serves to reinforce the conclusion based on *Lauritzen* that this Court should decline to exercise its jurisdiction. First of all, the considerations of relative ease to the access of proof, the availability of compulsory process and the cost of obtaining the attendance of willing witnesses strongly supports the declining of jurisdiction. Almost all important sources of proof are located in Singapore: govern-

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13 Accord: *DeMateos v. Texaco, Inc.*, 562 F. 2d 895 (3d Cir. 1977) (1966); *Yohanes v. Ayers Steamship Co.*, 451 F. 2d 349 (5th Cir. 1971); *Kearney v. Savannah Foods & Industries, Inc.*, 350 F. Supp. 85, 87 (S.D. Ga. 1972); *Vavatsikos v. Soulandris Brothers, Ltd.*, 209 F. Supp. 425 (E.D. La. 1962); *House v. Santa Fe International, Inc.*, 1978 AMC 1899 (S.D. Tex. 1978) (Sterling, J) (relying on *Ramirez v. Zapata Offshore Co.*, S.D. Tex. 1974, C.A. 73-H-1239 decided August 2, 1974, Bue J). [See Appendix II]

mental investigators[14] and other investigators, (who may have acted for Sembawang, among others) and their reports; most fact witnesses to the incident;[15] the supervisory employees of Sembawang who were in charge of the work being performed by deceased; all doctors' and medical reports;[16] experts on Singapore law; pertinent employment and other records of Sembawang; sources of proof as to the age, marital status and earnings of the decedent and his dependants, family support provided by the decedent; probable period of remaining work life; funeral costs; records of workmen compensation payments; and the bona fides of the claimed status of the Plaintiff and those she seeks to represent. The Vessel's officers and crew, many of whom would be required to testify in connection with the defense of this case, are all resident nationals of Italy. (Exxon Rec. Aff.) The cost of obtaining the attendance of willing witnesses for trial in Houston, Texas, would be prohibitive,[17] and many of the witnesses, whether

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14 Tan Bok Kwee, a Technical Officer attached to the Ministry of Labor, Singapore, who carried out an investigation into the Accident (Notes of Evidence, p. 8); Mun Shi Kin, Police Inspector attached to Pay e Lebar Police Station who also investigated the Accident (Notes of Evidence, p. 10).

15 Foo Chek Yow, Apprentice Pipe Worker employed by Sembawang Shipyard, 62-G Andrew's Avenue, Singapore 27 (Notes of Evidence, p. 1); Ong Eng Chuan, Steelworker employed by Sembawang Shipyard, No. 16, Track 7, Mandai Road, Singapore (Notes of Evidence, p. 12); Tong Nyiap Hin and Subash s/o Faragauan (Notes of Evidence, p. 14).

16 Dr. Wee Keng Poh, Department of Pathology, Toa Payoh Hospital, Singapore, who conducted autopsy on body of Leong Chong (Notes of Evidence).

17 On January 17, 1979, the cost of round trip air fare from Singapore to Houston and return, tourist class, was $1,735.-

(Continued from previous page)

they appear at trial in person or by deposition, would have to be heard through an interpreter.[18]

Secondly, in the present posture of the case, the Defendants are not in a position to assert their indemnity rights in a third party action under Rule 14 of the Federal Rules against the Shipyard, since it is a Singapore business enterprise, and is not subject to the jurisdiction of this Court.[19] It has often been noted that inability to implead other potentiality liable parties in the forum selected by the Plaintiff is a strong factor influencing the determination of whether to decline jurisdiction.[20]

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00. Obviously, the other expenses that would have to be incurred if willing witnesses were brought from Singapore would greatly exceed this amount. On the other hand, to fully develop the case by deposition for trial in Houston would require considerable time and expense.

18 For instance, witnesses Foo Chek Kow and Ong Eng Chuan apparently speak the dialects Hainanese and Hokkien respectively (Notes of Evidence, pp. 1, and 12).

19 Paragraph 15a of the Repair Contract between Sembawang Shipyard, Ltd. and EIC provides:

> The CONTRACTOR [Shipyard] shall indemnify the OWNER against and hold said OWNER harmless from all claims and damages arising from injuries to any person or persons (except employees of the OWNER, unless said employees are injured through carelessness or negligence of the CONTRACTOR) or from damage to property in or about or connected with the repairs, renewals, alternations (sic), conversion, drydocking, equipment and operations of the vessel until completion of this contract as set forth in paragraphs 9 and 10 of this AGREEMENT.

20 *See, Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 451-452 (2d Cir. 1975); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499, 501, 502 (1st Cir. 1966); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 815 (S.D. N.Y. 1972); *House v. Santa Fe International Corp.*, 1978 AMC 1899, 1905 (S.D. Tex. 1978).

Third, there are many other pretrial problems that would "make the trial of this case easy, expeditious and inexpensive" in Singapore, but would lead to hardship if the case is tried here. For instance, as discussed above, this court would be required to apply the law of Singapore. As previously noted, many courts, particularly those employing *Lauritzen* criteria in the *forum non conveniens* context find this factor pivoted to their determination as to whether to decline jurisdiction.[21] In *De Mateos v. Texaco, Inc.*, 562 F. 2d 895, 899 (3d Cir. 1977), the Third Circuit went so far as to hold that "The propriety of forum non conveniens dismissal would seem to turn, then, on whether the District Court was correct in concluding that American law does not apply."

Finally, there are factors of public interest to be considered. As was said by the Court in *Fitzgerald v. Texaco, Inc., supra*, 521 F. 2d at 450:

> Another factor to be considered is the public interest which includes a limitation on the use of a local forum for resolution of controversies which lack significant local contacts, especially when trial of the action would create administrative problems for the courts.[22]

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21 *Canada Melting (sic) Co. v. Paterson Steamship*, 285 U.S. 413, 52 S. Ct. 413, 76 L. Ed. 837 (1932); *Gulf Oil Company v. Gilbert, supra.*, 330 U.S. at 509; *Kozial v. The Fylgio*, 230 F. 2d 651 (2d Cir. 1956), *cert. denied*, 352 U.S. 827; *Del Rio v. Ballenger*, 391 F. Supp. 1002, 1004 (D. S.C. 1975); *Noto v. Cia Secula di Armanerto*, 310 F. Supp. 639, 648 (S.D. N.Y. 1970); *In Fitzgerald v. Texaco, Inc., supra.*, 521 F. 2d at 448, it was held that dismissal under doctrine of *forum non conveniens* can be warranted "even though the law applicable in the alternative forum may be less favorable to the plaintiff's choice of recovery."

22 *See, Papers Operator Consultants International, Ltd. v. SS HONG KONG AMBER, supra.*, 513 F. 2d at 672.

Except for the facts that Plaintiff filed her action in this District and that the Defendant Exxon Corporation is amenable to process here, there is no contact between this case and this District. Indeed, except for the fact that the indirect beneficial owner and manager of the Vessel is an American multinational corporation, there is no contact between this case and the United States. This is a matter local to Singapore and the United States has no more interest in its resolution than the Republic of Singapore has in the resolution of a claim of the personal representative of a deceased American shipyard worker killed in the Port of Houston while repairing a vessel registered in Singapore or owned by Singapore citizens. This matter falls into that class of case where "The Court must be concerned with and cannot disregard another aspect of the matter—how it came about that these suits were commenced in a court of the United States 'in a community which has no relation to the litigation.'" *Noto v. Cia Seculer di Armauentu*, 310 F. Supp., 639, 649 (S.D. N.Y. 1970).[23]

In considering the various factors present in this case, it is clear both under *Lauritzen* and *Gulf Oil Co. v. Gilbert*, that the contacts between this case and the United States

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[23] The court went on to observe:

> The courts would be derelict if they supinely stood by, aware that improper practices had flooded their dockets with litigation that truly belongs in another forum. The courts have "inherent power to protect [themselves] from a deluge of litigation by nonresidents, inspired by contingent retainers to avoid or overcome foreign laws and interpretation and application thereof by foreign courts * * *." (quoting from *Heine v. New York Life Ins. Co.*, 50 F. 2d 382, 387 (9th Cir. 1931).

are not sufficient to justify the retention of jurisdiction and that dismissal on *forum non conveniens* grounds would best serve the conveniens of the parties and the ends of justice.

Factors Supporting Retention of Case:	Factors Supporting Dismissal of Case:
1. Plaintiff's choice of forum.[24]	1. Plaintiff's decedent met his death in Singapore.
2. Vessel is managed by Defendant from the United States.	2. Plaintiff's decedent was a resident of Singapore.
3. Vessel is owned by Liberian corporation that is a 100% owned affiliate of Exxon Corporation.	3. Plaintiff's decedent was employed by a Singaporean business concern to work in Singapore.
	4. The courts of Singapore are available to Plaintiff.
	5. The law of Singapore controls the adjudication of this case.
	6. Most liability witnesses and all damage witnesses are in Singapore and are not amenable to the process of this court.
	7. The cost of obtaining the testimony of willing witnesses would be substantial.
	8. Defendants cannot implead the shipyard or the deceased's employer in the United States.
	9. The United States has no interest in the resolution of this case.
	10. Plaintiff will not be significantly inconvenienced by dismissal.[25]

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[24] The weight to be given to a plaintiff's choice of forum is dependent on several fatcors. Where the plaintiff is an American citizen, his choice is entitled to greater weight.

(Continued on following page)

While there are very few cases dealing directly with the question of whether American courts should accept jurisdiction of claims of foreign maritime workers injured in a foreign country while working on an American owned vessel, the cases that have faced the question are uniform in holding that dismissal on *forum non conveniens* grounds is appropriate. *Spencer v. Alcoa Steamship Company*, 221 F. Supp. 343 (E.D. N.Y. 1963), *aff'd per curiam*, 324 F. 2d 957 (2d Cir. 1963); (Jamaican longshoremen injured on American vessel); *Lernonis v. Prudential-Grace Lines, Inc.*, 81 Misc. 2d 614 (N.Y. S. Ct. 1975) (Greek longshoreman injured in Greek port); *Cf. Del Rio v. Ballenger*, 391 F. Supp. 1002 (D.S.C. 1975) (Panamanian national injured in auto collision in Panama).

WHEREFORE, Defendants respectfully urge that the Plaintiff's claims for relief under the Jones Act, the Death on the High Seas Act, and the General Maritime Law of the United

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(Continued from previous page)

Swift & Co. v. Compania Colombiana, 339 U.S. 684, 697, 70 S. Ct. 861, 94 L. Ed. 1206, 1215, 19 ALR 2d 630 (1950); *Mobil Tankers Company v. Mene Grande Oil Company*, 363 F. 2d 611, 614 (3d Cir. 1966), *cert. denied*, 385 U.S. 945; *Burt v. Isthmus Development Company*, 218 F. 2d 353, 357 (5th Cir. 1955), *cert. denied*, 349 U.S. 922. Implicit in these decisions is the principle that where a foreign plaintiff selects an American forum, his selection can much more readily be disregarded. *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499 (1966); *De Mateos v. Texaco Inc., supra; House v. Santa Fe International Corporation, supra; Spencer v. Alcoa Steamship*, 221 F. Supp. 343 (E.D. N.Y. 1963) *off'd per curiam*, 324 F. 2d 957 (2d Cir. 1963); *Del Rio v. Ballenger*, 399 F. Supp. 1002 (D.S.C. 1975); *Alverez v. Creole Petroleum Corporation, supra.*

25 *Fitzgerald v. Texaco, Inc., supra*, 521 F. 2d at 452.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Representative of the Estate of LEONG CHONG . . . ;	)	
YIP ONG CHU, Individually and as Representative of the Estate of TEO HO AIK . . . ;	)	CIVIL ACTION NO. H-78-477 (Filed June 23, 1980)
LOU WEE SANG, Individually and as Representative of the Estate of KOO MING KUANG	)	Judge Gabrielle K. McDonald
v.	)	
EXXON CORPORATION, ET AL.	)	

MEMORANDUM AND RECOMMENDATION:

This case involves three death claims from accidents aboard the tanker ESSO WILHELMSHAVEN ("Vessel"). The Vessel is documented in Liberia and is owned by Esso Tankers, Inc., a Liberia corporation which is a 100% indirectly owned affiliate of Exxon Corporation. The Vessel was managed under a marine service agreement by Exxon International Company, an unincorporated division of Exxon Corporation. In March, 1977, the Vessel entered shipyard in Singapore for repair work pursuant to written contract between Exxon International and Sembawang Shipyard Ltd. On March 13, 1977, two shipyard workers were killed in a fire and explosion in an oil tank in the Vessel. On March 24, 1977, a third shipyard worker, while engaged in repair work on the Vessel, was injured

and died after being struck in the head by a piece of falling metal.

Representatives of all three decedents have filed suit to recover under the Jones Act, the Death on the High Seas Act, the Texas Wrongful Death Statute, and the general maritime law of the United States. Representatives of the decedents in the explosion accident are also claiming under the Texas Survival Statutes, the Longshoremen's and Harbor Worker's Compensation Act, and for common law negligence and common law/maritime law products liability.

Claim on the head injury case was filed as H-78-477. Claims on the explosion case were filed as H-78-628. The two cases have been consolidated in H-78-477.

Defendant Exxon Corporation has filed Motion for Partial Summary Judgment and to Dismiss under the doctrine of *forum non conveniens*. Responses, brief and affidavits have been filed by the respective parties.

Explosion Accident

Plaintiff's decedents Teo Ho Aik and Koo Ming Kuang were welders employed by Roma Project Engineering Co. which provided workers to the Sembawang Shipyard for ships under repair at the shipyard, including the Vessel. On March 13, 1977, Aik and Kuang and a third Roma welder, Yip Lai Chee, were detailed by Roma's chargeman for the welding section to perform welding work in Port Tank No. 3. At about 2:35 that afternoon there was fire and an explosion in the tank. Aik and Kuang were killed. Chee was knocked unconscious but recovered. After an inquest, the coroner in Singapore returned an

open verdict as to the deaths of the two decedents. Plaintiff Loo Wee Sang is Kuang's representative. Yip Ong Chu is Aik's representative.

Falling Object Accident

Decedent Leong Chang was a shipwright employed by Sembawang Shipyard. On March 24, 1977, he had been sent to the lower engine room of the Vessel for repair work. In the ship's machine shop above the engine room, Nicolo Prezioso, member of the ship's crew, was working on a valve spindle. The spindle was dislodged, rolled across the deck and fell through an open access hatch above the lower engine room. While no one saw the spindle strike Chang, a worker nearby heard a thud and turned to see Chang lying face down on the deck with the spindle and his helmet near him. Chang later died in the hospital. The autopsy report certified cause of death as contused brain due to a fractured skull. After the inquest, the coroner found that Prezioso was not criminally negligent for Chang's death. Chick Kam Choo is the decedent's representative.

Jones Act

The Jones Act, 46 USCA § 688 provides:

> "Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law . . . and in case of death of any seaman as a result of any such personal injury the personal representative . . . may maintain an action. . . ."

The Jones Act does not define the term "seaman." To qualify as a Jones Act seaman, the injured worker must

be able to show that he was assigned permanently to or performed a substantial part of his work on a vessel, and that his duties contributed to the function of the vessel or to the accomplishment of its mission, or to its operation or welfare in terms of its maintenance. *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959). It is clear that the decedents fail to meet the first requirement of *Robison*. They were not permanently assigned to the Vessel nor to perform a substantial part of their duties on this Vessel. Decedents were shipyard workers assigned by the yard for repairs or work on any vessel in the yard. Their relationship to this Vessel was only transitory. In *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42 (5th Cir. 1960), the Court held that a welder on a barge, who worked under essentially the same conditions as presented in this case, was not a seaman. *Thibodeaux* is controlling. While the question of deciding who is a seaman may raise a question of fact for a jury, if there is no genuine factual dispute to be resolved, reference to the jury is not necessary. *Owens v. Diamond M Drilling Co.*, 487 F.2d 74 (5th Cir. 1973). Summary judgment may properly be granted when there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman. *Billings v. Chevron, USA, Inc.*, — F.2d — (5th Cir., No. 79-3173, June 9, 1980). Under the *Robison* test and the evidence presented, this magistrate finds no basis to support Plaintiff's contention that their decedents were seamen.

Further, the Jones Act by its terms requires an employer-employee relationship. *Spinks v. Chevron Oil Co.*, 507 F.2d 215 (5th Cir. 1975). Two of the decedents were employees of Roma and one was an employee of Sembawang Shipyard. There is no evidence of any control by

Defendants over these workers to justify a "borrowed employee" status. *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969).

Claims under the Jones Act are not available to Plaintiffs.

Death on the High Seas Act (DOHSA)

DOHSA, 46 USCA § 761 *et seq.*, by its title and by its terms, applies to deaths occurring on the high seas. The accidents resulting in the deaths of the decedents occurred in the territorial waters of Singapore, not on the high seas.

Claims under DOHSA are not available to Plaintiffs.

Longshoremen's and Harbor Worker's Compensation Act

Coverage provided by this Act is limited to a situation where "disability or death results from an injury occurring upon the navigable waters of the United States." 33 USCA § 903(a). Since the accidents occurred in Singapore waters, claims under this Act are not available to Plaintiffs.

General Maritime Law, Texas Statutes, Other Claims and Forum Non Conveniens

Since the issue in these subjects involves determining the applicable law, they may be considered together. *Lauritzen*[1] and *Rhoditis*[2] set forth eight factors generally considered in determining the choice of law in a maritime

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1 *Lauritzen v. Larson*, 345 US 571, 73 S.Ct. 921, 3 L.Ed.2 368; reh. denied 359 US 962, 79 S.Ct. 795, 3 L.Ed.2d 769 (1959).

2 *Hellenic Lines Ltd. v. Rhoditis*, 398 US 306, 90 S.Ct. 1731, 26 L.Ed.2d 252; reh. denied 400 US 856, 91 S.Ct. 23 (1970).

context. *Gulf Oil Company v. Gilbert*[3] is the leading case on the doctrine of *forum non conveniens*. The criteria have not been limited to the particular subject but have been considered in both types of cases.

Lauritzen-Rhoditis analysis must first be made to determine whether application of United States general maritime law is warranted in this case. Defendants have briefed the issue in detail under each of the eight factors, and Plaintiffs have filed brief in opposition. Review of all the cases cited need not be made here. Of the eight factors, only two point toward American law, the allegiance of the defendant shipowner and the base of operations. The Vessel is owned by an affiliate of Exxon, and the headquarters of Exxon is in Houston. The other contacts in this controversy substantially involve Singapore. It is the conclusion of this magistrate that the contacts do not warrant the application of general maritime law of the United States to otherwise foreign transactions.

With the conclusion that statutory and maritime law of the United States should not be applied, determination should then be made whether dismissal is warranted under the doctrine of *forum non conveniens*. This issue has also been briefed by both parties. On one hand, Plaintiffs' choice of forum has been in this Court and Defendant Exxon Corporation's principal place of business is here. On the other, the accidents occurred in Singapore; Plaintiffs are residents in Singapore, as were their decedents; the decedents were employed in Singapore by Singapore businesses to work there; most witnesses are in Singapore;

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[3] 330 US 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

and there are legal remedies available through the courts in Singapore. Defendants further contend that retention of jurisdiction here would cause an injustice in that Defendants could not seek contractual indemnification from the shipyard. It is this magistrate's conclusion that dismissal is appropriate.

Accordingly, it is RECOMMENDED that Defendant's Motion for Summary Judgment be GRANTED as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers Compensation Act, and the general maritime law of the United States.

It is RECOMMENDED that Defendants' Motion to Dismiss under the doctrine of *forum non conveniens* be GRANTED, without prejudice, provided that Defendants Exxon Corporation and Esso Tankers, Inc., consent to the jurisdiction of the appropriate Singapore court, submit to service of process in such court, waive any defense relating to any statute of limitation, and consent to satisfy any judgment rendered by said court.

The Clerk will file this instrument and transmit a copy to each party or counsel. Within ten days after receipt of the copy, a party may file with the Clerk, and serve on all parties, written objections, pursuant to Local Rule 24 and 28 USC § 636(b)(1)(C).

Done at Houston, Texas, this 18th day of June, 1980.

/s/ H. L. Platter
H. LINGO PLATTER
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Representative of the Estate of LEONG CHONG . . . :	)	CIVIL ACTION NO. H-78-477
YIP ONG CHU, Individually and as Representative of the Estate of TEO HO AIK . . . :	)	CIVIL ACTION NO. H-78-628
	)	(CONSOLIDATED)
LOU WEE SANG, Individually and as Representative of the Estate of KOO MING KUANG	)	(Filed July 31, 1980)
v.	)	Judge Gabrielle K. McDonald
EXXON CORPORATION, ET AL.	)	

ORDER OF DISMISSAL

The Court has reviewed the United States Magistrate's Memorandum and Recommendation, Objection of Plaintiffs, and Defendants' Response to Objections. It is ORDERED that said Memorandum and Recommendation be and the same is hereby accepted and adopted as the Court's Memorandum and Order.

It is therefore ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is GRANTED as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers Compensation Act, and the general maritime law of the United States.

It is further ORDERED, ADJUDGED and DECREED that Defendants' Motion to Dismiss under the

doctrine of *forum non conveniens* is GRANTED, without prejudice, provided that Defendants Exxon Corporation and Esso Tankers, Inc., consent to the jurisdiction of the appropriate Singapore court, submit to service of process in such court, waive any defense relating to any statute of limitation, and consent to satisfy any judgment rendered by said court.

The Clerk will enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this 31st day of July, 1980.

/s/ Gabrielle K. McDonald
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Representative of the Estate of LEONG CHONG . . . ;	)	CIVIL ACTION NO. H-78-477
YIP ONG CHU, Individually and as Representative of the Estate of TEO HO AIK . . . ;	)	CIVIL ACTION NO. H-78-628
	)	(CONSOLIDATED)
LOU WEE SANG, Individually and as Representative of the Estate of KOO MING KUANG	)	(Filed July 31, 1980)
v.	)	Judge Gabrielle K. McDonald
EXXON CORPORATION, ET AL.	)	

FINAL JUDGMENT

From a consideration of the pleadings submitted in this case, it is the opinion of this Court that this action should be and is hereby DISMISSED, without prejudice.

The Clerk will enter this Final Judgment and provide all parties with a true copy.

Done at Houston, Texas, this 31st day of July, 1980.

/s/ Gabrielle K. McDonald
UNITED STATES
DISTRICT JUDGE

NO. 84-00125

CHICK KAM CHOO, Individually and As Administratrix and/or Representative of the Estate of LEONG CRAIG, DECEASED and As Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN	)	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
vs.	)	270 JUDICIAL DISTRICT
EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	

PLAINTIFF'S ORIGINAL PETITION

(Jury Trial Requested)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CHICK KAM CHOO, Individually and As Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and As Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY FONG and LEONG CHOY TAN, hereinafter referred to as Plaintiffs, complaining of EXXON CORPORATION; ESSO TANKERS, INC.; and EXXON INTERNATIONAL COMPANY, INC., hereinafter referred to as Defendants, and for cause of action would respectfully show the Court, as follows, to-wit:

I.

Plaintiffs are citizens of Singapore.

Plaintiff, CHICK KAM CHOO is an individual and is the natural Mother of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN, minor Plaintiffs. The minor Plaintiffs are the natural children of LEONG CHONG, DECEASED.

Defendant, EXXON CORPORATION, is a corporation authorized to do business in the State of Texas with an agent for service in the State of Texas, and may be served with process by serving its registered agent, Mr. Roy L. Trusty, 800 Bell Street, Houston, Texas 77002.

Defendant, ESSO TANKERS, INC., is a foreign corporation which is doing business in the State of Texas within the meaning of Article 2031(b), Revised Civil Statutes of Texas, and does not maintain a registered agent for service of process nor a regular place of business within the State of Texas. Said Defendant operates solely as the alter ego of EXXON CORPORATION, and may be served with process by serving the Secretary of State for forwarding to the Defendant at 1251 Avenue of the Americas, New York, New York 10020.

Defendant, EXXON INTERNATIONAL COMPANY, INC., is a foreign corporation which is doing business in the State of Texas within the meaning of Article 2031(b), Revised Civil Statutes of Texas, and does not maintain a registered agent for service of process nor a regular place of business within the State of Texas. Said Defendant operates solely as the alter ego of EXXON CORPORATION, and may be served by serving the Secretary of State for forwarding to the Defendant at 1251 Avenue of the Americas, New York, New York 10020.

II.

This suit is brought under Article 4678, Revised Civil Statutes of Texas, which provides as follows:

> "Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or Country or of this State, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. All matters pertaining to procedure in the prosecution or maintenance of such action in the courts of this State shall be governed by the law of this State, and the court shall apply such rules of substantive law as are appropriate under the facts of the case."

III.

In connection with the foregoing, your Plaintiff would show that the nation of which the Plaintiff is a citizen has "equal treaty rights" with the United States. In connection with the foregoing statute, your Plaintiff would show that the Court should apply American (either the Jones Act and/or Texas common law) to this case. Plaintiff would show that there are substantial and/or significant contacts, within the meaning of the Texas conflict of law rules, between the Defendants and the transaction in question and the United States and Texas. Therefore, the application of American and Texas law is mandated. In this connection, Plaintiff alleges recovery under the Wrongful Death Statutes of Texas, Article 4671-4678 R.C.S., and the Survival Statute of the State of Texas, Article 5525 R.C.S.

IV.

In the alternative, and only in the alternative, Plaintiff requests the Court to apply the substantive law of Singapore which the Plaintiff would show is similar to the law of Texas with respect to liability and damages in this case. Notice is hereby given that the law of Singapore may be relied upon as a means of recovery herein.

V.

In addition to all the foregoing remedies, your Plaintiff sues under the Jones Act, 46 U.S.C. § 688. These claims are brought under the provisions of the Jones Act which allows the Plaintiff to sue in State or Federal Court and also under the Pendent Jurisdiction of this Court.

VI.

As pendant to the cause of action asserted herein and in the alternative and independently, suit is brought under 46 U.S.C. § 764 which provides as follows:

> "Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding."

In connection with that statute Plaintiff would show that Plaintiff has a cause of action not only under the laws of the United States but also under the laws of all foreign countries which are connected with the incident in question and now asserts those causes of action herein.

VII.

In addition, Plaintiff hereby expressly pleads all treaties between the United States and the nation of which the Plaintiff is a citizen. Under the terms of those treaties, the Plaintiff is guaranteed equal access to the Courts of the United States as are American citizens granted access to their Courts. It would be a violation of those treaties for this Court to dismiss this case on any grounds or to deny the access to our Courts by these citizens pursuant to the terms and provisions of such treaties. In particular, the Plaintiff now pleads the multilateral treaty entitled "Shipowners Liability" (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693. In particular your Plaintiff pleads Article 11 thereof which provides as follows:

> "This convention in national laws are regulations relating to benefits under this convention shall be so interpreted and *enforced* as to insure a quality of treatment to *all seamen* irrespective of *nationality*, domicile or race."

VIII.

In connection with these claims, Plaintiff would show that on or about the 24th day of March, 1977, the Decedent, LEONG CHONG, was a member of the crew of the vessel "ESSO WILHELM-SLAVEN", when by reason of the negligence of the Defendants, jointly and severally, and/or the unseaworthiness of the vessel and its appurtenances, he suffered and sustained fatal injuries, all of which caused the damages hereinafter alleged. Plaintiff would show that the negligence of the Defendants was a proximate cause of and/or was a cause, in whole or in part, at least to the slightest extent, of the death of the Decedent and the ensuing damages of the Decedent. More-

over, your Plaintiff would show that the unseaworthiness of the vessel and its appurtenances was a proximate cause and/or a cause, in whole or in part, at least to the slightest extent, of the death of the Decedent and the ensuing damages. Moreover, the Defendants are guilty of liability and causation under the law of Texas and/or the Jones Act and thus responsible for Plaintiff's damages under the law of Texas and/or the Jones Act.

IX.

Plaintiff would show that by reason of the death of Decedent, the surviving wife and children have suffered and sustained a loss of economic support that they otherwise would have been entitled to receive; they have sustained a loss of care, counsel, attention, corsortium, society, mental and moral training, and all of the other intangible and tangible rights to damages to which this Plaintiff is entitled under the laws of the State of Texas and/or under the maritime law of the United States and/or the laws of Nigeria.

In addition, your Plaintiff is entitled to recover the reasonable costs of burial of Decedent. Moreover, Plaintiff's estate, that is, the estate of the Decedent, does hereby sue for survival damages to which the Plaintiff's estate is entitled, which are the damages for the pain and suffering sustained by the Decedent to the point of his death. By reason of all of the foregoing, your Plaintiff would show that Plaintiff has been damaged in the sum and amount of ONE MILLION AND NO/100 ($1,000,000.00) DOLLARS, for which amount she comes now and sues. Plaintiff would show that the foregoing is merely an estimate of damages and would show the Court that the dam-

ages far exceed the minimum jurisdictional requirements of the Court and Plaintiff actually sues for whatever damages the Court and/or Jury might award her, but in no event less than the amount hereinabove alleged.

X.

Plaintiff would show that the conduct of the Defendants in this case was tantamount to a conscious and willful disregard for the rights of the Plaintiff and others similarly situated and therefore Plaintiff is entitled to punitive damages in the amount that should be assessed by the Jury, as punishment to these Defendants, and as an example to others who might be tempted to engage in the same kind of conscious and willful misconduct, of no less than two times the actual damages awarded.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Defendants be cited to appear and answer herein, and upon trial hereof that Plaintiff have her actual damages in the sum and amount of ONE MILLION AND NO/100 ($1,000,000.00) DOLLARS, punitive damages in the sum and amount of no less than two times actual damages, and such other and further relief to which she may show herself justly entitled.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

By: /s/ Benton Musslewhite
Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA No. 14752000

CO-COUNSEL:

/s/ Fred H. Benners
by Permission
FRED H. BENNERS
3104 Fairmount
Dallas, Texas 75201

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and As Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and As Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN	)	C.A. NO. H-84-497
vs.	)	
EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	(Filed Jan. 26, 1984)

PETITION FOR REMOVAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Exxon Corporation and Esso Tankers, Inc., foreign corporations, Defendant in the above entitled and numbered cause, and present this petition for removal of a suit brought by Chick Kam Choo, from the District Court of Harris County, 270th Judicial District of Texas, where the suit was instituted, to this United States District Court for the Southern District of Texas, Houston Division, and expressly reserving all questions other than that of a removal, for facts entitling your petitioner to removal respectfully shows:

1.

On January 3, 1984 in the District Court of Harris County, 270th Judicial District of Texas, Cause No. 84-

00125 upon the docket of said Court, Chick Kam Choo, as Plaintiff, filed suit and commenced her action against Exxon Corporation, Esso Tankers, Inc. and Exxon International Company, Inc., Defendants, your petitioners herein; service of said citation was made on the petitioner Exxon Corporation on January 13, 1984 in the City of Houston, Harris County, Texas; that thirty days have not expired after the date of service of process upon that Defendant.

2.

The above entitled and numbered cause is a suit of a civil nature at law; that it appearing from the petition that Plaintiff seeks to recover from your petitioner the sum of $1,000,000.00 actual and an unstated amount of punitive damages for personal injuries to Plaintiff allegedly caused by Defendant's negligence and/or unseaworthiness of the M/T ESSO WILHELMSHAVEN together with costs of court, all as more fully appears from the allegations of Plaintiff's petition herein.

3.

That the Plaintiff at the time of the commencement of the said suit and at all of the times mentioned in the petition was, and now is, a citizen and resident of the Republic of Singapore, a country other than the country of incorporation or principal place of business of Defendant.

4.

The Defendant, Exxon Corporation, was at the time of the commencement of said suit, and was at all times mentioned in the petition herein, and still is, a corporation

organized and existing under the laws of the State of New Jersey, and has its principal place of business in the State of New York in the United States of America, which state is different from that country of which Plaintiff herein is a citizen and resident as aforesaid. The Defendant Exxon International Company, was at all times mentioned in the petition herein, and still is a (sic) unincorporated division of the Defendant Exxon Corporation. The Defendant Esso Tankers, Inc. was at the time of the commencement of said suit, and was at all times mentioned in the petition herein and still is, a corporation organized and existing under the laws of the Republic of Liberia where it maintains its principal place of business.

5.

The aforesaid controversy between Plaintiff, a citizen and resident of the Republic of Singapore, and Defendants, citizens and residents of the State of New Jersey and the Republic of Liberia, and having their principal places of business in the State of New York and Liberia is within the diversity jurisdiction of the United States District Court for the Southern District of Texas, Houston Division; that the matter in controversy between the Plaintiff and said Defendant exceeds, exclusive of interest and costs, the sum of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS; that your petitioner denies any liability herein on its part and disputes such claims of the Plaintiff, and states that it has valid defenses.

6.

The petitioners present herewith a copy of all process, pleadings, and orders served in such action, to-wit: Copies

of the Plaintiff's petition and citation thereon, attached hereto as Exhibit "A".

7.

This suit is removable notwithstanding the allegations contained in Plaintiff's Petition that her decedent was a seaman and that she is entitled to recover under the Jones Act because it has been finally decided in an identical action filed in this Court by the same Plaintiff being closed Civil Action No. H-78-477, styled *Chick Kam Choo, et al. v. Exxon Corporation, et al.*, that the Plaintiff's decedent was not a Jones Act seaman as a matter of law. *See Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (4th Cir. 1983) cert. den. 104 S.Ct. 98.

8.

That petitioner has made, executed, presents and files herewith a good and sufficient bond in the sum of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS, with sufficient surety for paying all costs and disbursements incurred if said District Court should hold that said suit was not removable or was improperly removed to this Court.

WHEREFORE, the Defendants, Exxon Corporation and Esso Tankers, Inc., pray that this Honorable Court enter such further orders and grant such further relief as may be necessary to secure removal herein and prevent further proceedings in said District Court of Harris County, Texas, and for such other relief as Defendant is justly entitled to receive.

Respectfully submitted,

By /s/ James Patrick Cooney
James Patrick Cooney
Attorney in Charge
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380
Attorneys for Defendants,
Exxon Corporation and Esso
Tankers, Inc.

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

THE STATE OF TEXAS
COUNTY OF HARRIS

Before me, the undersigned authority, on this date personally appeared James Patrick Cooney, who being duly sworn on oath says:

I am with the firm of Royston, Rayzor, Vickery & Williams. I have read the foregoing Petition for Removal and know the contents thereof, and the same are true and correct; that the sources of my information are correspondence from Defendant as well as records with which I have been supplied.

/s/ James Patrick Cooney
James Patrick Cooney

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 26th day of January, 1984.

/s/ Rosalie L. Smith
Notary Public in and for
Harris County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually	)	
and As Administratix and/or	)	
Representative of the Etsate of	)	
LEONG CHONG, Deceased, and	)	
as Next Friend of LEONG CHOY	)	
WAN, LEONG CHOY HUR,	)	C. A. NO.
LEONG CHOY FONG and	)	H-84-497
LEONG CHOY TAN	)	
	)	
vs.	)	
	)	
EXXON CORPORATION,	)	
ESSO TANKERS, INC. AND	)	
EXXON INTERNATIONAL	)	
COMPANY, INC.	)	

MOTION OF PLAINTIFFS TO REMAND CAUSE TO STATE COURT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiffs in this cause, and files this their Motion to Remand to the State court, requesting that this Court remand this cause to the District Court for Harris County, Texas and order all costs of this Court be paid by the Defendants, as well as attorneys fees of the Plaintiff, and further requesting this Court to impose sanctions, and for such motion would respectfully show the Court as follows, to-wit:

I.

Rules Governing Removal Generally

Removal of a case from the State Court in which it was originally brought to Federal Court is governed by the provisions of 28 U.S.C. §§ 1441 *et seq.* Generally, a

case is removable only if it could have originally been brought in a federal court. 28 U.S.C. § 1441(a). Cases in which diversity jurisdiction exists are generally removable if none of the defendants is a resident of the state in which the action was originally brought. 28 U.S.C. § 1441 (b). When a Congressional statute, such as the Jones Act, 46 U.S.C. § 688, provides that a claim or cause of action cannot be removed, it must remain in State Court unless it is brought in conjunction with a separate and independent claim or cause of action that would be removable if sued upon alone. 28 U.S.C. § 1441(a), (c). Finally, the courts have held that removal jurisdiction is a derivative jurisdiction. If subject matter jurisdiction does not exist at the Sate Court level, the action may not be removed even though it could have originally been brought in the federal courts. See *Lambert Run Coal Co. v. Baltimore & Ohio Railroad Co.*, 258 U.S. 377, 42 S.Ct. 349 (1922).

Once a case has been removed to Federal Court and a motion to remand has been made, defendants always bear the burden of establishing that removal is proper. 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3721 at p. 530. Removability is determined by the plaintiffs' pleadings and an action cannot be removed because plaintiff failed to assert a claim that would have been removable. *Id.* The removal statutes are strictly construed against removal and many courts have held that all doubts should be resolved against removal of an action. *Id.* at 535-37.

II.

Jones Act Allegations Require Remand

This cause should be remanded because the Plaintiffs have alleged a cause of action under the Jones Act, 46

U.S.C. § 688. It is the unquestionable law of the Fifth Circuit that in such situations, the Court must remand the case to State Court—that is, where the Plaintiffs have chosen to file a Jones Act case in the State court, as the Plaintiffs have in this case (see Plaintiffs' Original Petition filed in the State Court suit, in the 270th Judicial District Court of Harris County, Texas, Cause No. 84-00125, to which Petition reference is made for all purpose, the same being incorporated herein by reference and being the same petition that was attached to the Defendants motion for removal to this Court). As can be seen from said petition, your Plaintiffs have clearly alleged a cause of action under the Jones Act in the State Court. Under such circumstances, this Court has no choice but to remand to State court. As mentioned above, subsection 1441(a) of Title 28 of the United States Code, which announces the general rule for removability, contains the important caveat "[e]xcept as otherwise provided by Act of Congress, . . . " cases in which the United States courts have original jurisdiction shall be removable. The instant case involves a claim pursuant to the Jones Act, 46 U.S.C. § 688. That act reads in part:

> . . . . and in the case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable . . . ."

This provision makes the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. § 51 et seq., applicable to death actions by seamen. Section 6 of F.E.L.A., 45 U.S.C. § 56, allows an action to be brought in either state court or federal court by a seaman or a seaman's representative. Apparently deciding that such an election would have little value if the action was removable to federal court at a defendant's option, Congress originally provided in Section 56 that F.E.L.A. actions brought in state court would not be removable. Later this provision was deleted from the F.E.L.A. itself, and was incorporated into the sections of Title 28 that deal with the removability of actions. Section 1445(a) of Title 28 today provides that:

> A civil action in any state court against a railroad or its receivers or trustees, arising under Sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

The Fifth Circuit, whose case law this court is bound to follow, has held pursuant to this subsection that a Jones Act claim brought in state court may not be removed to federal court. *Pate v. Standard Dredging Corp.*, 193 F.2d 498, 500 (1952). *Pate* was cited with approval by the Supreme Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371, 79 S.Ct. 468, 480 fn.29 (1959).

This non-removability of a Jones Act claim should not end the Court's inquiry, however, since 28 U.S.C. § 1441(c) provides that:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Defendants argue that since Plaintiffs have asserted a cause of action for unseaworthiness under the General

Maritime Law in addition to the Jones Act cause of action, a separate claim or cause of action which would be removable if sued upon alone exists, and, under § 1441(c), the entire case is removable. Such an argument would overlook the second part of the Fifth Circuit's holding in *Pate v. Standard Dredging Corp., supra*, 193 F.2d at 500-02, namely, that a claim for unseaworthiness is not a separate and independent cause of action under § 1441(c) because both it and the Jones Act claim arise from "a single wrongful invasion of a single right" of a plaintiff. *Pate, supra*, 193 F.2d at 501; see also *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 321, 47 S.Ct. 600, 602 (1927); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14, 71 S.Ct. 534, 540 (1951). Even if such a claim were construed to fall under the Death on the High Seas Act (DOSHA), the same reasoning, that it involves a single invasion of a single right of the plaintiff, would apply. See the opinion by Judge Kennerly in *Ducoff v. Cities Service Oil Co.*, 102 F.Supp. 423 (S.D. Tex. 1951) which presents exactly the same fact situation as the instant case—a death action under both the Jones Act and unseaworthiness. The allegations contained in the state court petition regarding the Jones Act and the General Maritime Law do not, under the law of this circuit or of this district, constitute separate and independent claims. The action is therefore not removable on the basis of § 1441(c).

III.

Previous Determination By This Court That Jones Act Does Not Apply Was Not A Binding Determination And Does Not, In Any Event, Obviate Court's Duty To Remand Case To State Court

Despite the consistency of the Fifth Circuit cases requiring that this case be remanded to state court, where

Jones Act allegations have been made in state court, the Defendants attempt to circumvent such decisions by asserting that this Court has previously determined in this case that the Jones Act does not apply. See allegations contained in Paragraph VII of Defendants "Petition for Removal". However, the Defendants failed to mention that the dismissal order to which the Defendants refer (in Cause No. H-78-477 in the United States District Court for the Southern District of Texas), which dismissal order is attached to the Defendants Motion to Dismiss and for Sanctions, filed in this cause, was a dismissal "*without prejudice*". (See Final Judgment dated July 31, 1980 in said cause, H-78-477). It is hornbook law, something each law student learns on the first day of law school, that a dismissal "without prejudice" does not constitute "res judicata" as asserted by the Defendants in their Petition for Removal. It is obvious that the allegations in the Defendants' Petition for Removal and in the Defendants "Motion to Dismiss and for Imposition of Sanctions" (see Paragraph I of the Motion to Dismiss and for the Imposition of Sanctions) to the effect that the prior dismissal order of this court, which was clearly "without prejudice" constituted res judicata, is a totally frivolous allegation, for which the imposition of sanctions should indeed be made against the counsel for Defendants. In any event, the prior order of this Court does not preclude the action in State court, since the order of dismissal in this Court was "without prejudice".

IV.

Prior Determination That Choice of Law Should Be Foreign And The Case Should Be Dismissed On Grounds of Forum non Conveniens Does Not Obviate Requirement That Case Be Remanded

Defendants assert that because this Court dismissed this case on grounds of forum non conveniens, in the previous case, the Plaintiffs cannot state a cause of action on the basis of the Jones Act in State Court. In the first place, the position of the Defendants fails to take account of Rule 41(e) of the Federal Rules of Civil Procedure which clearly provides dismissals concerning venue are not final orders that can constitute res judicata. Moreover, the Fifth Circuit, whose rulings this Court is bound to follow, has held in the case of *Yawn v. Southern Railway Co.*, 591 F.2d 312 (5th Cir. 1979) that allegations of failure to state a cause of action will not overcome the ban on removal of Jones Act cases found in 28 U.S.C. § 1445(a).

The Jones Act incorporates all statutes dealing with personal injury and death rights and remedies of railroad workers, including the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (FELA), *and 28 U.S.C. § 1445(a), which prohibits removal of FELA cases.* In the *Yawn* case, the Fifth Circuit was faced with the question of whether this ban on removal of FELA cases continued to apply when a defendant has removed a case alleging failure to state an FELA cause of action. Deciding that the ban on removal provided in § 1445(a) continued to apply when such allegations are made, the Court said:

> "Congress has unequivocally declared that in FELA suits filed in state courts, the federal courts are without jurisdiction to proceed in the matter until the cause has run its course at the state level. *Gamble v. Central of Ga.Rv.*, (sic) 486 F.2d 781 (5th Cir. 1973). *The initial question is whether the prohibition against removal found in section 1445(a) applies when the defendant asserts that the complaint fails to state a cause of action under the FELA. We think it does.* See *Smith v. Camas Prairie Ry.*, 216 F.799 (D.C. Idaho 1914), cited by this court in *Porter v. St. Louis-San Francisco Rv.*, 354 F.2d 840, 844 (5th Cir. 1966). Consequently, a defendant who asserts that the state court erred in assessing the sufficiency of the FELA *complaint cannot, for that purpose, remove the suit but most (sic) pursue his arguments in state court channels before appealing to the federal courts for relief.*" (519 F.2d at 316; emphasis added).

V.

If Allegations In Plaintiffs' State Court Petition Present Any "Possibility" Of A Valid State Court Action, Cause Cannot Be Removed On Grounds Of Fraudulent Joinder Of State Court Actions

In order to properly plead a cause of action under the Jones Act, a plaintiff must allege that he was a seaman employed by the Defendant and that he was injured through the Defendant's negligence while in the course and scope of his employment. These facts were properly alleged by Plaintiffs, and the Defendants have shown absolutely nothing to indicate that such allegations were in any way "fraudulent". Defendants rely, basically, upon their contention that Plaintiffs have failed to state a claim under the Jones Act. According to the Fifth Circuit, this is not enough to overcome the ban on removal found in 28 U.S.C. § 1445(a) and made applicable to Jones Act cases by the decision in *Pate v. Standard Dredging Corp, supra.*

In addition to the *Yawn* decision, which clearly mandates that any challenge Defendants have to the Jones Act cause of action should be made in State rather than federal court, Plaintiffs would again like to stress that the determination of fraudulent joinder of a Jones Act claim does not involve an intensive inquiry into whether Plaintiffs will prevail in State court. Instead, the test is whether there is *any possibility* that Plaintiffs have asserted a valid cause of action in State court. In other words, Defendants must show that there is absolutely *no possibility* that Plaintiffs have asserted a valid cause of action in State court. As can be seen from the discussion below, clearly a valid cause of action has been stated in State court. Since any uncertainties as to the current state of controlling substantive law must be resolved in favor of Plaintiffs, *B, Inc. v. Miller Brewing Co.*, 663 F.2d 245 (5th Cir. 1981), it is obvious that there is at least the "possibility" that Plaintiffs could recover under the Jones Act in State court and that therefore this case should not have been removed. See *Dudley v. Community Public Service Co.*, 108 F.2d 119 (5th Cir. 1939).

VI.

Forum Non Conveniens Determinations In Federal Courts Not Binding On State Courts

Moreover, if the Defendants attempt to give any effect of finality to the dismissal without prejudice concerning the forum non conveniens determination, we should point out that the United States Supreme Court held, in *Parsons v. Chesapeake & Ohio Railway Co.*, 375 U.S. 71, 84 S.Ct. 185 (1963), that a prior final decision to dismiss for forum non conveniens in state court has no res judicata effect upon a motion to transfer pursuant to 28 U.S.C. § 1401(a)

filed in a later identical federal suit. 28 U.S.C. § 1404(a) is, of course, a codification of the common law doctrine of forum non conveniens. In reaching this decision the Court noted that dismissal on the basis of forum non conveniens is discretionary and that different factors apply in different forums. This reasoning is particularly apropos to this case since Texas Revised Civil Statutes (Vernon's), Article 4678 provides:

> *Death in a foreign State.* Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country or of this State, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. All matters pertaining to procedure in the prosecution or maintenance of such action in the courts of this State shall be governed by the law of this State, and the court shall apply such rules of substantive law as are appropriate under the facts of the case.

Due to this statute, there is considerable doubt as to whether the doctrine of forum non conveniens can be applied to a personal injury or death case brought in the Texas courts. See *Allen v. Bass*, 47 S.W.2d 426 (Tex.Ct.Civ.App., El Paso, 1932, writ ref'd). In that case, the court was construing Article 4678 and held unequivocally that in a suit brought under Article 4678 the courts have no discretion to dismiss a cause of action asserted on grounds of *forum non conveniens*. The court had this to say about Article 4678:

" . . . under article 4678 we think he (the Plaintiff) *has an absolute right to maintain the present action* in the courts of this State if New Mexico is to be regarded as a foreign state, within the meaning of Article 4678, and *the courts of this state are left without any discretion in the matter.*"

Corpus Juris, vol. 26, p. 889, says:

"Foreign State, a Foreign Country or Nation: For all legal purposes the term embraces a neighboring state." And in the notes refers to a number of cases, among them, Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25. We refer to the case for the argument, without quoting.

We have concluded that article 4678 opens the courts of this state to citizens of a neighboring state (and foreign country) and *gives to them an absolute right to maintain a transitory action of the present nature and to try their cases in the courts of this state*, (46 S.W.2d at p. 427; emphasis ours).

Allen v. Bass has not been reversed, nor distinguished, nor discredited by any subsequent decision. It is the law of Texas at the present time. For discussion of this, see Comments, *Forum Non Conveniens: The Need For Legislation In Texas*, 54 Tex.L.Rev. 737 (1976); and *Article 4678 and Forum Non Conveniens*, O'Quinn and Hagans, Vol. 18, #1, Trial Lawyers Forum, pp. 11-14.

There are a number of cases wherein the choice-of-law/forum non conveniens question has been determined adversely to the Plaintiffs in federal court, the suit has been subsequently filed in State court, and the State courts have held that the prior finding of the federal courts with respect to choice-of-law/forum non conveniens is not finding (sic) upon the State court. See *Boskoff v. Boeing Co.*, 16 Av.L.Rep. (CCH) 17,753 (Sup.Ct. N.Y. 1981); *Kahn v.*

United Technologies Corp., 16 Av.L.Rep. (CCH) 17,751 (Sup.Ct. Conn. 1981); and *Aboujdid v. Gulf Aviation Co., Ltd.*, 108 Misc.2d 175 (Sup.Ct. 1980) aff'd, 448 N.Y.Sup.2d 427 (First Dept., 1982).

Moreover, the Federal Courts in the Southern District of Texas have held that, with respect to the choice-of-law and forum non conveniens question, the Federal Court should look to the State laws with respect thereto. *Tokio Marine & Fire Insurance Company, Ltd. v. Bell Helicopter Textron, A Division of Textron, Inc.*, 17 Av.Cas. 17,321 (S.D. Tex., 1982). The Court in that case stated that where a federal court is adjudicating a state substantive action (for example if we assume arguendo for the moment that the Jones Act does not apply, as contended by the Defendants, thus presenting the question of adjudicating the State Court claims under a diversity theory), the federal court "must follow the substantive law of the state in which the Federal Court is sitting (citations omitted), including the forum's choice of law rules (citations omitted)". The Court went on, in that case, to state that "this Court (the Federal Court) is therefore required to look at Texas choice of law rules".

VII.

Diversity Not Present Here

***Alternatively, even** if the Jones Act did not apply, this cause cannot be removed on the grounds of diversity of citizenship as contended by the Defendants (see Paras. III-V of the Defendants' Petition for Removal).*

As hereinafter argued, it is clear without any doubt that this cause should be remanded, despite allegations of diversity of citizenship as a basis for removal.

As provided by 28 U.S.C. § 1441(b), a case can be removed on the basis of diversity only if "none of the Defendants is a resident of the state in which the action was originally brought". If any one of the Defendants is a resident of the state in which the suit is brought, the case is not removable. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch), 267, 2 L.Ed. 435 (1806). In this case, there is a fact question as to whether Exxon Corporation is a "citizen" of the State of Texas. It has a principal office here. The question is whether or not the office in Houston, Texas is its principal office or the office in New York is its principal office. The law is clear that two places are relevant as far as "citizenship" in diversity cases is concerned: the place of incorporation and the place where the home office or principal place of business is maintained. In this connection your Plaintiffs have noticed the deposition of the corporate officer of Exxon Corporation to inquire about those facts. If the facts demonstrate that Exxon's principal place of business is Houston, Texas, then of course this case is not removable and for that additional reason, the cause should be remanded.

VIII.

It has long been held by the Courts that suits by aliens against aliens are not removable because such action is not one where the Federal District Court had original jurisdiction. *Merchants Cotton-Paris & Stewarts Company v. Insurance Company North America*, 151 U.S. 368 (Sup.Ct., 1894); *Kavourgias v. Nicholaou*, 148 F.2d 96 (9th Cir. 1945); *Compania Minerae y Comparadora v. American Metal Company*, 262 F. 183 (5th Cir. 1920); and *Johnson*

v. Action Insurance Company, 35 F. 374 (Ct.App.-Mich. 1888). The foregoing rule still applies even though Defendants who are citizens of states of the United States other than the forum state are added to alien Defendants. *Compania Minerae y Comparadora v. American Metal Company*, supra. In the foregoing case alien Plaintiffs brought suit against alien Defendants *and* Defendants who were citizens of a state and the court expressly held that such case was one in which the federal district court did not have original jurisdiction over the suit brought by the alien Plaintiffs and that therefore the cause could not be removed from a state court to the federal court. We submit that the foregoing case is totally controlling of this case and mandates that this Court remand this cause of action to State Court.

In this case, the Defendants' Petition for Removal is fatal unto itself. In it Defendants stipulate and admit that the Plaintiffs are citizens of "the Republic of Singapore", a foreign country, and that the Defendant Esso Tankers, Inc., is a corporation incorporated under the laws of "the Republic of Liberia" where, as the Defendants alleges, admits and stipulates "it maintains its principal place of business in" (see page 3 of the Petition for Removal). Therefore, since we have, as admitted in the face of the Defendants Petition for Removal, "foreign Plaintiffs" suing at least one "foreign Defendant" the Federal District Court did not have original jurisdiction over the suit; therefore, the cause cannot be removed from a State Court to the federal court and must be remanded. *Compania Minerae y Comparadora v. American Metal Company*, supra.

IX.

Attorneys and Sanctions
Against Defendants Justified

Since the allegations of the Defendants concerning "res judicata" are obviously frivolous and since the removal, in view of the Jones Act allegations in State Court, are obviously frivolous, and since they are further frivolous in view of the admission by the Defendants in the face of their Petition for Removal that this suit involves a suit between foreign Plaintiffs and a foreign corporate Defendant, thus further indicating that the removal action was frivolous, this is an appropriate case for the imposition of sanctions and attorney's fees and costs of Court. See *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). In a remand case, the imposition of costs against the removing Defendants includes attorneys fees. *Bass v. Elliot*, 71 FRD 693 (1976). Therefore, the Plaintiffs request the Court to remand this case to State Court, as it should; and impose costs against the Defendants, including attorney's fees in an amount of no less than TWO THOUSAND FIVE HUNDRED AND NO/100 ($2,500.00) DOLLARS; and impose sanctions upon the Defendants in order to deter such future frivolous removals, which only impair the efficiency of the Federal Courts.

Respectfully submitted,

LAW OFFICES OF BENTON
MUSSLEWHITE, INC.

/s/ By: Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was forwarded, via Certified Mail, Return Receipt Requested, to Mr. James Patrick Cooney of Royston, Reyzor, Vickery & Williams, 2200 Texas Commerce Tower, Houston, Texas 77002, on this the 27th day of February, 1984.

/s/ Benton Musslewhite
Benton Musslewhite

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN	)	CIVIL ACTION NO. H-84-497
vs.	)	
EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	

RESPONSE OF EXXON CORPORATION
TO PLAINTIFF'S MOTION TO REMAND

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Exxon Corporation and Esso Tankers, Inc., Defendants herein, and file this their Response to Plaintiff's Motion to Remand and would show to the Court as follows:

I.

PLAINTIFF IS PRECLUDED FROM ASSERTING
A JONES ACT CLAIM

The principal thrust of Plaintiff's Motion to Remand is her attorney's contention that the presence of allegations setting forth a claim under the Jones Act in the State Court Petition precludes the removal of this case

from State Court, even though the Jones Act claim asserted in the State Court action is identical to the claim asserted in Civil Action No. H-78-477 filed in this Court on March 14, 1978, upon which summary judgment was entered for the Defendants. According to the Plaintiff's attorney, the granting of summary judgment for the Defendants on the Jones Act issue in the prior action cannot effectively preclude its reassertion in a subsequent case in a different forum because this Court's Final Judgment dismissing the remaining issues in the prior action only dismissed the remainder of the case "without prejudice." In fact, such Final Judgment has no impact on the issues currently before the Court because Plaintiff's claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers' Compensation Act, and the general maritime law of the United States had been dismissed in the Court's Order granting Summary Judgment on those issues to the Defendants. Copies of the Plaintiff's Complaint in the first action before this Court, the Order of Dismissal disposing of the Jones Act claim, and the Final Judgment dismissing any remaining issues without prejudice are attached hereto as Exhibit "A".

In particular, though the Final Judgment entered in the prior action dismissed the case without prejudice, the Order of Dismissal upon which the final judgment was predicated provided:

> It is therefore ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is GRANTED as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers' Compensation Act and the general maritime law of the United States.

The question is thus raised as to whether rulings made pursuant to Rule 56 of the Federal Rules of Civil Procedure which dispose of a portion of the claims asserted in an action pending before the Court as a component of the overall disposition of the action are to have a preclusive effect in subsequent litigation. It seems to be the Plaintiff's position that Judge McDonald in granting Defendants' Motion for Summary Judgment on the Jones Act issue in the prior action was merely playing at a game with no lasting consequence and that the Plaintiff (or her attorney), dissatisfied with the result thus obtained and after futile attempts at reversal at all appellate levels, is now free and unencumbered to start anew as if the previous action had never been decided. Surely this cannot be the law. As observed by Judge Brown in *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313, 1319 (5th Cir. 1970) *cert. denied*, 400 U.S. 991:

> It would be strange indeed if a summary judgment could not have collateral estoppel affect. This would reduce the utility of this modern device to zero. * * * Indeed, a more positive adjudication is hard to imagine.

While the motion before the Court in the prior action was for a "partial" summary judgment on the issues of the applicability of the Jones Act, the Longshore and Harbor Workers' Compensation Act, the Death on the High Seas Act and the general maritime law of the United States, these rulings were a constituent part of the final judgment, which was entered on the same day as the ruling on Defendants' Motion for Partial Summary Judgment. Thus, Plaintiff's attorney was immediately in a position to contest the District Court's ruling on the Jones Act issue and in fact did so. Twelve weeks after the Summary

Judgment was entered, the Plaintiffs filed a Motion for Relief pursuant to Rule 60(b), which was denied. The denial was appealed to the Fifth Circuit, where it was affirmed in an opinion by Judge Tate, *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir. 1983), a copy of which is attached hereto as Exhibit "B". Rehearing, rehearing *en banc*, and writ of certiorari were also subsequently denied. Prior to the Court's discussion of the scope of review available under Rule 60(b), the Court reported the District Court's action as follows:

> Adopting the logic and conclusions of a magistrate's memorandum and report as its own, the district court dismissed the plaintiffs' suit, finding on summary judgment:
>
> (1) that none of the plaintiffs was a Jones Act "seaman", under the test articulated in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) and its progeny, entitled to invoke the Jones Act.

Defendants do not contest the fact that a proper Jones Act claim asserted in a State Court action cannot be removed under Section 1441 of Title 28. At the same time, a State Court plaintiff cannot prevent the removal of an action by attempting to assert claims and issues that have been finally resolved through judgment and appeal, and the relitigation of which is precluded by the doctrine of *res judicata*. Such a practice could lead only to chaos and anarchy.

II.

DIVERSITY JURISDICTION ATTACHES IF JONES ACT CLAIM IS PRECLUDED

In this cause, the Plaintiff has sued the same Defendants that were named in the previous federal action:

Exxon Corporation, Esso Tankers, Inc., and Exxon International Company, Inc. This Court has diversity jurisdiction over the matter under Section 1332 of Title 28, U.S.C. The applicable provisions of Section 1332 provide as follows:

> (a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between—
>
> * * *
>
> (2) Citizens of a state and citizens or subjects of a foreign state . . .

The Plaintiffs are, so far as Defendants are aware, citizens of the Republic of Singapore. Defendant Exxon Corporation is a corporation existing under the laws of the State of New Jersey, with its principal place of business in the State of New York. Exxon International Company, Inc. is an unincorporated division of Exxon Corporation. Esso Tankers, Inc. is a corporation existing under the laws of the Republic of Liberia with its principal place of business in the State of New Jersey. (See Amended Petition For Removal. The allegation contained in the Original Petition that Esso Tankers, Inc. maintained its principal place of business in the Republic of Liberia was, and is, incorrect.) Accordingly, both of the corporate Defendants are citizens of a state of the United States, namely New York or New Jersey.

Moreover, Paragraph I of the Plaintiff's Original Petition contains the averment that Esso Tankers, Inc. "operates solely as the alter ego of Exxon Corporation, and may be served with process by serving the Secretary

of State for forwarding to the Defendant at 1251 Avenue of the Americas, New York, New York 10020." Thus, looking at the face of the Plaintiff's Petition, it is clear that Esso Tankers, Inc. is included in this action only because of its alleged relationship to Exxon Corporation, whose citizenship should be determinative for these purposes.

As for the citizenship of Exxon Corporation, the Court is referred to Judge Cox's opinion in *Exxon Corporation v. Duval County Ranch Company*, 406 F. Supp. 1367 (S.D. Tex. 1975), which contains an extensive discussion of the citizenship of Exxon Corporation in the specific context of a diversity issue. The court there states in pertinent part:

> The corporate headquarters for Exxon Corporation are in New York City, and the division headquarters for Exxon, U.S.A. are in Houston, Texas. All major business and financial decisions affecting the Exxon Corporation and its divisions are made in its New York headquarters. Tax returns for the entire Exxon Corporation are filed in New York. *Id.* at 1368.
>
> * * *
>
> [T]he citizenship of [Exxon Corporation] is New Jersey, the state of its incorporation, and New York, the state of its principal place of business. *Id.* at 1369, 1370.

Therefore the requirements of Section 1441 of Title 28 as well as the requirements of strict diversity are satisfied and the Court may properly exercise jurisdiction over this case. *See Ed & Fred, Inc. v. Puritan Marine Insurance Underwriters Corp.*, 506 F.2d 757 (5th Cir. 1975).

It is clear that a petition which contains a Jones Act allegation may be removed if the Jones Act allegation is made in a fraudulent attempt to evade removal. *See Preston v. Grant Advertising, Inc.*, 375 F.2d 439 (5th Cir. 1967). Further, the trial court in determining whether a Jones Act allegation is fraudulently made to avoid removal may look beyond the allegations of the complaint filed in state court to the facts underlying those allegations. *Hale v. Tata Corporation*, 502 F. Supp. 502 (S.D. Tex. 1980). In this case, the Court should simply take judicial notice of the Order of Dismissal and Final Judgment entered in Civil Action Number H-78-477 and conclude that the question of Jones Act coverage has been precluded in this case.

III.

PLAINTIFFS CANNOT IN GOOD FAITH ALLEGE A CURRENTLY EXISTING CAUSE OF ACTION UNDER THE JONES ACT

Plaintiffs allege in their Motion to Remand that this cause should be remanded because the Plaintiffs have alleged a cause of action under the Jones Act, 46 U.S.C. § 688. In arguing that Jones Act claims may not be removed from state courts to federal courts, Plaintiffs admit that the Federal Employer's Liability Act, 45 U.S.C.A. § 51 *et seq.*, is incorporated by reference in to (sic) the Jones Act. In order properly to allege a Jones Act cause of action, regardless of the underlying factual support, it at least must be alleged that the necessary elements for a Jones Act claim exist, as prescribed by the Jones Act itself and the FELA. Section 56 of the FELA requires that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of

action accrued." Though they must do so in order to avoid removal of their claim to federal court, Plaintiffs have not and cannot allege that this provision of the statute has been complied with. In fact, as is stated in Defendants' motion to dismiss this action, it has been more than six years since the decedent's death, which occurred on March 24, 1977. Plaintiffs therefore not only have not alleged the necessary facts to support a claims (sic) under the Jones Act, but in fact cannot allege such facts. Defendants would cite the Court to the Plaintiff's Original Complaint filed in the original litigation of this cause in the United States District Court for the Southern District of Texas which contains the indisputable statement that "on or about the 24th day of March, 1977, Leong Chong was killed while in the course and scope of his employment aboard the vessel ESSO WILHELM-SHAVEN." As any action under the Jones Act is indisputably time barred, the Jones Act does not preclude removal of this case to this Court.

IV.

PLAINTIFFS ARE PRECLUDED FROM REASSERTING LIABILITY ON THE PART OF THE DEFENDANTS UNDER THE JONES ACT BY THIS COURT'S PRIOR DECISION THAT THE PLAINTIFF'S DECEDENT DID NOT QUALIFY AS A JONES ACT SEAMAN

Plaintiffs spent a substantial amount of effort in their Motion to Remand attempting to persuade the Court that Judge McDonald's prior holding that the case should be dismissed pursuant to *forum non conveniens* does not preclude relitigation of the Jones Act issue in state court. This, however, ignores the fact that Judge McDonald's

summary judgment dismissal of certain issues in this case not only found that the case should be dismissed on the basis of *forum non conveniens* but also, separately, found "that none of the Plaintiffs was a Jones Act seaman, under the test articulated in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) and its progeny, entitled to invoke the Jones Act." 699 F.2d 694. The potential effect of the *forum non conveniens* finding therefore becomes irrelevant in view of the more specific finding that the Plaintiff's decedent did not qualify as Jones Act seamen. Of course, any attempt by the Plaintiffs to argue that case law concerning the *res judicata* effect to be given *forum non conveniens* holdings is in any way instructive regarding the *res judicata* effect to be given to the Court's totally separate and specific finding that Plaintiff's decedent did not qualify as a Jones Act seaman would be and is grossly in error.

V.

INQUIRY INTO THE SUFFICIENCY OF THE ALLEGATIONS MADE IN A PLAINTIFF'S ORIGINAL COMPLAINT TO SUPPORT AN ACTION UNDER THE JONES ACT IS PROPERLY MADE BY A COURT CONSIDERING REMAND OF AN ACTION TO STATE COURT

Plaintiffs contend that the opinion in the case of *Yawn v. Southern Railway Co.*, 591 F.2d 312 (5th Cir. 1979), prevents consideration by this Court of the *res judicata* effect of the prior judgment in this case or the fact that any Jones Act claim held by the Plaintiffs is now time barred. In actuality the *Yawn* case, together with other Fifth Circuit cases including *Keating v. Shell Chemical Co.*, 610 F.2d 328 (5th Cir. 1980), fully supports the

proposition that a federal court making a determination of whether to remand a particular case to state court should make at least some inquiry into the allegations of the parties seeking to remand. Such inquiry would certainly encompass evidence that relitigation of the matter is barred by the doctrine of *res judicata* or that the Plaintiff's cause of action is time barred. Indeed, even in the *Yawn* case itself, the court conducted some investigation into the factual allegations made by the plaintiffs concerning the qualification of the employees as those employees entitled to recover under the Act, the alleged cause of the employees' injuries, and the kind of injuries incurred. Defendants herein require no such extensive consideration of the Plaintiff's factual allegations in this case, but merely request that the Court consider the legal questions surrounding the previously discussed *res judicata* and time bar issues in this case.

WHEREFORE, PREMISES CONSIDERED, Defendants Exxon Corporation and Esso Tankers, Inc. pray that the Court deny Plaintiff's Motion to Remand this cause to state court and that it have such other and further relief to which it may be justly entitled.

Respectfully submitted,

James Patrick Cooney
Attorney-in-Charge for Defendants
Exxon Corporation and
Esso Tankers, Inc.
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion was served on the Plaintiff's attorney Benton Musslewhite, Esq., of the Law Offices of Benton Musslewhite, Inc., 609 Fannin Street, Suite 517, Houston, Texas 77002, by hand delivery.

This ..... day of ....., 1984.

.....

Of Royston, Rayzor, Vickery & Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN	)	CIVIL ACTION NO. H-84-497
vs.	)	
EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	

MOTION TO DISMISS
AND FOR THE IMPOSITION OF SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Exxon Corporation and Esso Tankers, Inc., Defendants in the above civil action and file this their Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and for sanctions against Plaintiff's attorney pursuant to Rule 11 of the Federal Rules of Civil Procedure, and for cause thereof would show to the Court as follows:

I.

This civil action is barred under the doctrine of *res judicata*. On March 14, 1978, Plaintiff filed a civil action in this Court, being Civil Action No. H-78-477, styled *Chick Kam Choo, Individually and as Administratrix and/*

or Representative of the Estate of Leong Chong, and Next Friend of Leong Choy Wan, Leong Choy Hur, Leong Choy Fong and Leong Choy Lan (sic) v. Exxon Corporation, Esso Tankers, Inc. and Exxon International Company, Inc., in which a claim to recover for the wrongful death of Leong Chong was asserted. The present action is virtually identical to Civil Action No. H-78-477. A copy of Plaintiff's Original Complaint in Civil Action No. H-78-477 is attached hereto as Exhibit "A".

II.

On July 31, 1980, an Order of Dismissal and a Final Judgment was entered in Civil Action No. H-80-78-477 by the Honorable Gabrielle McDonald. Copies of the Order of Dismissal and Final Judgment are attached hereto as Exhibits "B" and "C". In dismissing Civil Action No. H-78-477, the District Court adopted the Memorandum and Recommendation of United States Magistrate Platter filed on June 23, 1980, which concluded, *inter alia* that Plaintiff's decedent was not a seaman for the purposes of the Jones Act and that the case should be dismissed under the doctrine of *forum non conveniens*.

III.

Plaintiff's attorney did not file a timely appeal, but instead filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the District Court's Final Judgment. This motion was denied by way of a Minute Entry filed on December 8, 1981. Plaintiff filed a timely Notice of Appeal. The Court of Appeals for the Fifth Circuit affirmed the District Court's denial of relief under Rule 60(b) of the Federal Rules of Civil Procedure in *Chick Kam Choo v. Exxon Corp.*, 699

F.2d 693 (5th Cir. 1983). After petitions for rehearing and rehearing *en banc* were denied, the Plaintiff filed a petition for a *writ of certiorari* to the United States Supreme Court, which was denied on October 3, 1983, 104 S.Ct. 98 (1983).

On January 6, 1984, Plaintiff filed Cause No. 84-00125 in the 270th District Court of Harris County, Texas, which became the instant civil action upon timely removal.

IV.

Plaintiff's attorney-in-charge in Civil Action No. H-84-497 has been attorney-in-charge with regard to this matter since the filing of the motion to set aside this Court's judgment in the prior action.

V.

In any event, Plaintiff's cause of action for the death of her decedent, which occurred on March 24, 1977, over six years ago, is barred by all applicable statutes of limitation and by the doctrine of laches.

VI.

Under Rule 11 of the Federal Rules of Civil Procedure, as amended, it is provided:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other papers; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless

> increase in the cost of litigation . . . if a pleading, motion or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other papers, including a reasonable attorney's fees.

VII.

Because he served as attorney-in-charge in the previous civil action filed in behalf of the Plaintiff, the present attorney-in-charge had knowledge that the filing of the present civil action was not well grounded in fact and was not arranged by existing law in that the controversy had been fully litigated, a final judgment entered, and after exhaustive appeals, that any further prosecution of the Plaintiff's claim was barred by the doctrine of *res judicata*. In view of the flagrant disregard by Plaintiff's attorney-in-charge of his responsibilities under Rule 11 of the Federal Rules of Civil Procedure, Defendants request that Plaintiff's attorney-in-charge be directed to pay to the Defendants all of the reasonable expenses incurred because of the filing of the instant civil action, including reasonable attorneys' fees, and such other sanctions as the Court may deem appropriate.

WHEREFORE Defendants request that this civil action be dismissed for the reason that it is barred by the doctrine of *res judicata*, or, in the alternative, by the applicable statute of limitations or doctrine of laches, that sanctions be imposed upon Plaintiff's attorney-in-charge and that the Defendants have such other and further relief to which they may be justly entitled.

Respectfully submitted,

/s/ James Patrick Cooney
Attorney-in-Charge for Defendants
Exxon Corporation and
Esso Tankers, Inc.
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

NOTICE OF SUBMISSION

To: Chick Kam Choo and her
attorney-in-charge Benton Musselwhite, Esq.
609 Fannin Street, Suite 517
Houston, Texas 77002

You are hereby notified that the above motion will be submitted to the Court on the 20th day of February, 1984, or as soon thereafter as may be practical.

/s/ James Patrick Cooney
Attorney for Defendants

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion was served on the Plaintiff's attorney Benton Musselwhite, Esq., of the Law Offices of Benton Musselwhite, Inc., 609 Fannin Street, Suite 517, Houston, Texas 77002, by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This 9th day of February, 1984.

/s/ James Patrick Cooney
Of Royston, Rayzor, Vickery &
Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, Individually and As Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and As Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN	)	C.A. NO. H-84-497
vs.	)	
EXXON CORPORATION; ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND DEFENDANTS' MOTION FOR IMPOSITION OF SANCTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

I.

The Court should not consider the Defendants' motion to dismiss until *after* it has ruled on Plaintiffs' motion to *remand* to State court. *Bancochio Corp v. Fox*, 516 F.2d 29 (6th Cir. 1975).

II.

This civil action is not barred under the doctrine of res judicata. As the order of the United States District Court of March 14, 1978 in Cause No. H-78-477, clearly indicates, this cause was dismissed "without prejudice"

(see "Final Judgment" dated July 31, 1980). Therefore, the prior order of the District Court in Cause No. H-78-477 cannot any way be a bar to a subsequent proceeding nor can it constitute "res judicata".

III.

Moreover, under Rule 41(c), all dismissals with respect to "venue", such as a forum non conveniens dismissal, do not constitute "res judicata".

IV.

Moreover, there have been a number of Courts which have held a dismissal on grounds of forum non conveniens in Federal Court does not bar a subsequent filing of the same cause of action in State Court; indeed, the State Court may decide whether or not it will retain venue and if it so decides it is not barred by the prior determination of the federal Court that it would not retain venue. *Boskoff v. Bocing Company*, 16 AV. L.Rep. (CCH) 17,753 (Sup.Ct. N.Y. 1981); *Kahn v. United Techonlogies Corporation*, 16 AV. L.Rep. (CCH) 17,751 (Sup.Ct. Conn. 1981); *Aboujdid v. Gulf Aviation Company, Ltd.*, 108 Misc.2d 175 (Sup.Ct., 1980) aff'd, 448 N.Y.S.2d 427 (First Dept. 1982).

V.

In addition, the question of whether or not a person is a seaman is generally one of fact. *Spinks v. Chevron Oil Company*, 507 F.2d 216 (5th Cir. 1975); and *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959). Thus, there is nothing about the prior order of dismissal of the Federal Court that constitutes res judicata to any extent.

VI.

Since the only grounds for the present dismissal of the Defendants is on the basis of "res judicata" and since it is obvious that this ground is not well taken, the motion to dismiss should be in all things denied. In addition since it is obvious that the motion to dismiss and for sanctions was filed on a frivolous basis, not only should the motion to impose sanctions be denied, but the Court should, indeed, impose sanctions upon counsel for the Defendants, charge costs to such Defendants and enter an order for attorneys fees in favor of the Plaintiff's counsel.

VII.

That with respect to Plaintiffs' response to Defendants' motion to dismiss and for sanctions, Plaintiff incorporates all briefs, depositions, other evidence and matters filed on behalf of Plaintiffs in the Houston federal court prior proceeding and adopts all of said depositions, pleadings and briefs filed with respect to said forum non conveniens question and question of whether or not the Plaintiff was a seaman and incorporate them herein by reference, as if copied verbatim herein. Plaintiff moves the Court to enter an order allowing the filing of such briefs, petitions, motions, depositions and the like, should the Court not immediately remand this case, as the Plaintiffs respectively believe it should.

WHEREFORE, Plaintiffs request that the Defendants motion for sanctions and for dismissal be in all things denied and that the Court impose sanctions upon the counsel for the Defendants by ordering such counsel to pay attorneys fees to counsel for Plaintiffs and costs of these proceedings.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

By: /s/ Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was forwarded, via Certified Mail, Return Receipt Requested, to Mr. James Patrick Cooney of Royston, Rayzor, Vickery & Williams, 2200 Texas Commerce Tower, Houston, Texas 77002, on this the 20th day of February, 1984.

/s/ Benton Musslewhite

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, et al.	)	
	)	
Plaintiffs	)	CIVIL ACTION
	)	NO. H-84-497
vs.	)	
	)	(Filed May
EXXON CORPORATION, et al.	)	15, 1984)
	)	
Defendants.	)	

ORDER & FINAL JUDGMENT

On April 6, 1984 came on to be heard Plaintiffs' motion for removal and Defendants' motion to dismiss and for the imposition of sanctions. From a consideration of the motions and the evidence submitted in this cause, and based upon the findings entered into the record on April 6, 1984, it is the opinion of this Court that Plaintiffs' attorney brought this case in bad faith and that it should be dismissed. It is therefore,

ORDERED, ADJUDGED and DECREED that Plaintiffs' motion to remand is DENIED and Defendants' motion to dismiss is GRANTED. It is further ordered that Defendants' motion for the imposition of sanctions against Plaintiffs' attorney Benton Musselwhite pursuant to Rule 11 of the Federal Rules of Civil Procedure is GRANTED. Accordingly Mr. Musselwhite shall pay to Defendants $4,749.00 as reasonable attorney's fees and $131.92 for costs of court, for a total of $4,880.92. subject to the payment of interest at the rate of 11.74 percent from the date of signing until the date of payment. This amount repre-

sents expenses incurred by Defendants in the defense of this matter.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 15th day of May, 1984.

/s/ Norman W. Black
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, et al.,	)	
	)	
Plaintiffs	)	CIVIL ACTION
	)	NO. H-84-497
vs.	)	
	)	(Filed August
EXXON CORPORATION, et al.,	)	16, 1985)
	)	
Defendants.	)	

ORDER

Pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit which vacated the final judgment previously entered by this Court, it is hereby ORDERED, ADJUDGED and DECREED that this lawsuit is remanded to the DISTRICT COURT OF HARRIS COUNTY, 270th Judicial District of Texas, Cause No. 84-00125, for want of jurisdiction pursuant to 28 U.S.C. § 1447(c).

Done at Houston, Texas, this 16th day of August, 1985.

/s/ Norman W. Black
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHICK KAM CHOO, et al.,	)	
	)	
Plaintiffs	)	CIVIL ACTION
	)	NO. H-84-497
vs.	)	
	)	(Filed August
EXXON COPORATION, et al.,	)	16, 1985)
	)	
Defendants.	)	

FINAL JUDGMENT

For the reasons set out in the Court's Order of Remand entered this date, the above styled action is hereby REMANDED to the District Court of Harris County, 270th Judicial Court of Texas, Cause No. 84-00125 upon the docket of said Court.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 16th day of August, 1985.

/s/ Norman W. Black
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORP., ET AL.	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. H-86-606
CHICK KAM CHOO,	)	
ETC., ET AL.	)	

COMPLAINT FOR INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Exxon Corporation and Esso Tankers, Inc., Petitioners, and file this their Complaint for Injunctive Relief to enjoin Defendants Chick Kam Choo, Individually and as the Administratrix and/or Representative of the Estate of Leong Chong, Deceased, and as next friend of Leong Choy Wan, Leong Choy Hur, Leong Choy Fong and Leong Choy Tan, and her attorneys of record Benton Musslewhite, Esq. and Joseph C. Blanks, Esq., from attempting to relitigate Civil Action No. H-78-477 in the courts of the State of Texas after final judgment has been entered by this Court and would show to the Court as follows:

I.

This action arises under Section 1651(a) of Title 28, U.S.C. This Court's jurisdiction to protect its own judgments is supplemental to the jurisdiction it possessed over the original civil action and no other basis of jurisdiction is required.

II.

Chick Kam Choo is an individual who is not a resident of the State of Texas, but who is doing business in the State of Texas within the meaning of the Texas Long Arm Statute and may be served through Benton Musslewhite, who is the person in charge of her business within the State of Texas at this time. Benton Musslewhite may be served at 608 Fannin Street, Suite 517, Houston, Texas 77002, and Joseph C. Blanks can be served at 1119 First Texas Building, 470 Orleans Street, Beaumont, Texas 77701.

III.

On March 14, 1978, Defendant Chick Kam Choo filed a civil action in this Court being Civil Action Number H-78-477, styled CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN vs. EXXON CORPORATION, ESSO TANKERS, INC. and EXXON INTERNATIONAL COMPANY, INC., in which a claim to recover for the wrongful death of Leong Chong was asserted. Defendant has now filed a virtually identical action in the District Court of Harris County, Texas. A copy of the Defendant's Original Complaint in Civil Action Number H-78-477 is attached hereto as Exhibit "A".

IV.

On July 31, 1980, an Order of Dismissal and a Final Judgment was entered in Civil Action Number H-78-477 holding, *inter alia*, that Defendant's decedent was not a

Jones Act seaman as a matter of law and dismissing the wrongful death action asserted pursuant to the federal maritime doctrine of *forum non conveniens* for further proceedings in the Republic of Singapore. Copies of the Order of Dismissal and the Final Judgment are attached hereto as Exhibits "B" and "C".

V.

Defendant Chick Kam Choo did not file a timely appeal from this Court's Final Judgment of July 31, 1980, but acting through her attorney, Benton Musslewhite, filed instead a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the Final Judgment. This motion was denied on December 8, 1981, and a notice of appeal was filed. The United States Court of Appeal for the Fifth Circuit affirmed the District Court's denial of relief under Rule 60(b) in *Chick Kam Choo v. Exxon Corp.*, 696 F.2d 693 (5th Cir. 1983). After petitions for rehearing and rehearing en banc were denied by the Fifth Circuit, the Defendant Chick Kam Choo, acting through her attorney Benton Musslewhite, filed a petition for Writ of Certiorari in the United States Supreme Court, which was denied on October 3, 1983, 104 S.Ct. 98 (1983).

VI.

On January 6, 1984, the Defendant Chick Kam Choo, again acting through her attorney Benton Musslewhite, filed an Original Petition in the 270th Judicial District of Harris County, Texas (Cause No. 84-00125), which was substantially identical to the Complaint filed in Civil Action No. H-78-477. A copy of the Original Petition in Cause No. 84-00125 is attached hereto as Exhibit "D".

Cause No. 84-00125 was removed to this Court on grounds of diversity of citizenship and alienage jurisdiction and assigned Civil Action No. H-84-497. This Court denied Defendants' motion to remand the case and granted Plaintiffs' motion to dismiss. Defendant filed its notice of appeal to the Fifth Circuit on June 12, 1984. On July 8, 1985 the Fifth Circuit issued its opinion holding that the necessary subject matter jurisdiction was lacking and vacated and remanded case with instructions that it be remanded to state court. The order remanding the case was entered in (sic) August 16, 1985.

VII.

The Defendants Benton Musslewhite and Joseph C. Blanks are the attorneys of record in Cause No. 84-00125 pending in the 270th Judicial District Court of Harris County, Texas. The claims asserted by the Original Petition filed by the Defendants in Cause No. 84-00125 in the 270th District Court are substantially identical to the claims asserted in Civil Action No. H-78-477 and constitute a blatant attempt on the part of the Defendants to relitigate those claims and to thereby avoid the effect of the Final Judgment entered in Civil Action No. H-78-477 by this Court. Therefore, this Court is empowered pursuant to Sections 1651 and 2283 of Title 28, U.S.C., to grant a permanent injunction to enjoin the Defendants from seeking to relitigate in any state forum the issues finally decided in Civil Action No. H-78-477 in order "to protect or effectuate its judgments."

VIII.

Petitioners Exxon Corporation and Esso Tankers, Inc. will suffer irreparable harm if the injunctive relief

requested herein is not granted in that they will be required to relitigate at their peril issues that have been finally decided in Civil Action No. H-78-477.

VII. (sic)

Petitioners Exxon Corporation and Esso Tankers, Inc. have no adequate remedy at law.

WHEREFORE, PREMISES CONSIDERED, Exxon Corporation and Esso Tankers, Inc. respectfully request that they be granted temporary, preliminary and permanent injunctive relief enjoining the Defendants, or any other attorney acting in their behalf, from attempting to relitigate the issues finally determined in Civil Action No. H-78-477 in any pending or future State Court proceeding and that the Petitioners herein have such other and further relief to which they may be justly entitled.

Respectfully submitted,

.....

James Patrick Cooney
Attorney in Charge for Plaintiffs
Exxon Corporation and
Esso Tankers, Inc.
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared James Patrick Cooney, who being duly sworn on oath says:

I am a member of the firm of Royston, Rayzor, Vickery & Williams and attorney in charge for the Petitioner. I have read the foregoing Complaint and know the contents thereof, and the same are true and correct.

.....

James Patrick Cooney

SUBSCRIBED AND SWORN TO BEFORE ME, on this ..... day of ....., 1986.

.....

Notary Public in and for
Harris County, TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORP., ET AL.	)	CIVIL ACTION
	)	No. H-86-606
vs.	)	
	)	(Filed March
CHICK KAM CHOO, ET AL.	)	7, 1986)

RESPONDENTS' MOTION TO DISMISS

Come Respondents Chick Kam Choo, et al. and, subject to the defenses raised herein, including lack of *in personam* jurisdiction, file their Motion to Dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, showing the Court:

LACK OF SUBJECT MATTER JURISDICTION

This Honorable Court is without jurisdiction of the subject matter of this cause. The Petition concerns a civil action pending in State Court, heretofore removed to this same Honorable Court and thereafter ordered remanded by the United States Court of Appeals for the Fifth Circuit. The Court held that no subject matter jurisdiction existed as between these parties. No new issues have been introduced or change of parties such as would create subject matter jurisdiction. The dispute is one between aliens on one side and alien and citizen on the other. No federal question exists and diversity jurisdiction is destroyed by the juxtaposition of aliens as parties.

LACK OF JURISDICTION OVER THE PERSON

Chick Kam Choo and the other individuals named in the Petition, save attorneys Musslewhite and Blanks, are

not and have never been within the State of Texas. They do no business in the State within the meaning of the Texas Long Arm Statute. They are resident citizens of Singapore, having no property in Texas and no connection therewith other than their long frustrated attempt to adjudicate their claims against the Petitioners for the wrongful death of their decedent caused by the negligence of the Petitioners. The Court has no jurisdiction over their persons. To assert same is a violation of the due process clause of the Constitution of the United States.

PROCESS AND SERVICE THEREOF ARE INSUFFICIENT

No process has been served upon Chick Kam Choo or the other Singapore Respondents. Benton Musslewhite is not their agent for service of process and service upon him or upon Joseph C. Blanks is no service at all as to the Singapore residents.

PETITIONERS' FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The Anti-Injunction Act, prohibits the issuance of a writ of injunction to stay proceedings in any Court of a State, "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

The act of Congress relied upon by Petitioners, 28 U.S.C. 1651, only authorizes the issuance of such writs "necessary or appropriate in aid of [the Courts'] jurisdictions and agreeable to the usages and principles of law." The Court of Appeals has held that this Court has no jurisdiction over the parties in this cause. Because this Court has no jurisdiction to aid respecting these parties, 28 U.S.C. 1651 has no relevance.

There is no need for this Honorable Court to "effectuate its judgment" as to this cause. To the extent that the original judgment of the Federal Court has *res judicata* effect on Respondents' State Court action, the Petitioners can raise it there. To suggest that Petitioners Exxon Corp. and Esso Tankers, Inc. will suffer irreparable harm by having to file a brief motion for partial summary judgment on the grounds of *res judicata* is nonsense.

No action has been taken by the District Court of Harris County that can be in the least construed as contradictory or injurious of the judgment entered in H-78-477. No reason exists to believe that such will happen. And until or unless the State Court acts so as to ineffectuate this Court's judgment, the issuance of a writ is neither necessary nor appropriate. To the contrary, it is prohibited by law. Petitioners, therefore, have failed to state a claim for relief.

WHEREFORE, PREMISES CONSIDERED, Respondents pray the Court grant their motion to dismiss all other relief to which they show themselves justly entitled.

Respectfully submitted,

Original Signed By
Joseph C. Blanks
Joseph C. Blanks, P.C.
470 Orleans Suite 1119
Beaumont, Texas 77701
(409) 833-2245
TexBarNo. 02456770

Certificate of Service

A true copy of the above was hand delivered to all counsel 3/7/86

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORP, ET AL.	)	
	)	CIVIL ACTION
VS.	)	NO. H-86-606
	)	
CHICK KAM CHOO, ET AL.	)	

ORDER

CAME ON THIS DAY to be heard the motion of Respondents Chick Kam Choo, et al., Motion to Dismiss Pursuant to Rule 12(b), in the above styled and numbered cause, and the Court, having considered the motion, is of the opinion that and it is, therefore

ORDER, ADJUDGED, and DECREED that the motion of Respondents be and is hereby granted and this cause is hereby dismissed with prejudice.

SIGNED and ENTERED this the ..... day of March, 1986.

.....
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORP., ET AL.	)	
	)	CIVIL ACTION
vs.	)	NO. H-86-606
	)	
CHICK KAM CHOO, ET AL.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Exxon Corporation and Esso Tankers, Inc., Plaintiffs herein, and file this their Opposition to Defendants' Motion to Dismiss and would show to the Court as follows:

I.

SUBJECT MATTER JURISDICTION

As pointed out in Plaintiffs' Complaint for Injunctive Relief, the Court's jurisdiction is supplemental or ancillary to the jurisdiction it possessed over the original action and that no other independent ground of jurisdiction is required. *Dugas v. American Surety Co.*, 300 U.S. 414, 418 (1937); *Southwest Airlines, Co. v. Texas International Airlines*, 546 F.2d 84, 90 (5th Cir. 1977). There is no question but that the requisite subject matter jurisdiction was present in Civil Action No. H-78-477. Since the present action is supplemental or ancillary to the original action, subject matter jurisdiction is present here.

II.

JURISDICTIOIN OVER THE PERSON

Service was made on the Plaintiff through her attorney Benton Musslewhite pursuant to Sec. 17.043 of the

Texas Civil Practice and Remedies Code (Supp. Pamphlet: 1985), which provides:

> In an action arising from a nonresident's business in this state, process may be served on the person in charge, at the time of service, of any business in which the nonresident is engaged in this state if the nonresident is not required by statute to designate or maintain a resident agent for service of process.

Under Sec. 17.042, "a nonresident does business in the state if the nonresident: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state."

Quite clearly, Chick Kam Choo, an undisputed nonresident, entered into a contract with her attorney, Benton Musslewhite, performable by the filing of one or more lawsuits in the State of Texas. Given the attorney-client relationship and the absence of the Defendant Chick Kam Choo from the state, it is clear that Mr. Musslewhite is the person in charge of her business in the State of Texas. It is submitted then that jurisdiction over the person of the Defendant Chick Kam Choo was properly obtained by personal service on the person in charge of his business in the State of Texas, Benton Musslewhite. If there should be any doubt on this point, the Plaintiffs respectfully request an opportunity to present additional evidence as to the relationship between Mr. Musslewhite and his client Chick Kam Choo.

III.

A CLAIM UPON WHICH RELIEF
CAN BE GRANTED

There can be no question that Plaintiffs' Complaint for Injunctive Relief states a claim upon which relief can

be granted. In three recent cases involving substantially identical facts, permanent injunctive relief has been granted against Mr. Musslewhite enjoining him from attempting to relitigate in Texas state courts claims originally brought in federal court in behalf of foreigners and finally dismissed under the doctrine of *forum non conveniens*. *Texaco Inc. v. Musslewhite, et al.*, Civil Action No. S-85-168-CA (E.D. Tex. February 28, 1986); *Sherrill v. Brikerhoff Maritime Drilling*, Civil Action Nos. C-82-0836-WWS and C-82-2563-WWS (N.D. Calif. January 30, 1986) appeal pending; *In Re: Ocean Ranger, Sinking Off Newfoundland On February 15, 1982* (MDL Docket No. 508, August 14, 1985) *on appeal* pending (Copies of these opinions are attached hereto).

WHEREFORE, PREMISES CONSIDERED, Plaintiffs Exxon Corporation and Esso Tankers, Inc., respectfully request that Defendants' Motion to Dismiss be denied.

Respectfully submitted,

/s/ James Patrick Cooney
2200 Texas Company Tower
Houston, Texas 77002
713/324-8380
Attorney in Charge for Plaintiffs,
Exxon Corporation and
Esso Tankers, Inc.

OF COUNSEL:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on opposing counsel, Joseph C. Blanks, Esq., 470 Orleans, Suite 1119, Beaumont, Texas

77701, by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This 3rd day of March, 1986.

/s/ James Patrick Cooney
Of Royston, Rayzor, Vickery & Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORP., ET AL.	)	
	)	CIVIL ACTION
VS.	)	NO. H-86-606
	)	
CHICK KAM CHOO, ET AL.	)	

ORDER

CAME ON THIS DAY to be heard the Defendants Chick Kam Choo, et al., Motion to Dismiss Pursuant to Rule 12(b), in the above styled and numbered cause, and the Court, having considered the motion, is of the opinion that it is, therefore

ORDERED, ADJUDGED, and DECREED that the motion of Defendants be and is hereby denied.

SIGNED and ENTERED this the ..... day of ....., 1986.

.....
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORPORATION AND ESSO TANKERS, INC.	)	
vs.	)	
CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN, BENTON MUSSLEWHITE AND JOSEPH C. BLANKS	)	CIVIL ACTION NO. H-86-606

MOTION FOR SUMMARY JUDGMENT AND
APPLICATION FOR PERMANENT
INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Exxon Corporation and Esso Tankers, Inc., Petitioners herein, and file this their Motion for Summary Judgment and Application for Permanent Injunctive Relief pursuant to Rules 56 and 65 of the Federal Rules of Civil Procedure and show to the Court as follows:

I.

Plaintiffs have filed their Complaint for Injunctive Relief seeking to enjoin and restrain the Defendant Chick Kam Choo and her attorneys, Benton Musslewhite and Joseph C. Blanks from attempting to relitigate the issues finally determined in Civil Action No. H-78-477, in which

a Final Judgment was entered by this Court on July 31, 1980.

II.

Defendants are presently prosecuting Cause No. 84-00125 in the 270th Judicial District of Harris County, Texas, which cause is substantially identical to Civil Action No. H-78-477, which was finally decided by this Court in 1980.

III.

There is no genuine issue of material fact. There can be no question that Civil Action No. H-78-477 decided by this Court in 1980 and Cause No. 84-00125 pending in the 270th District Court of Harris County, Texas, both represent attempts to recover for the wrongful death of Leong Chong who was killed while working aboard the M/V ESSO WILHELMSHAVEN while it was undergoing repairs in Singapore. The Plaintiffs in this action were defendants in C. A. No. H-78-477 and are defendants in Cause No. 84-00125 (Exxon International Company, Inc., while named as a party in both actions is in fact an unincorporated division of Exxon Corporation). Thus, both the parties and the underlying claim are identical. Finally, there can be no doubt that the Plaintiffs are exposed to irreparable harm if injunctive relief is not granted and that they lack an adequate remedy at law. After having litigated this matter through a final judgment, appeal and the denial of an application for writ of certiorari to the United States Supreme Court, the Plaintiffs should not be exposed to the vexation and uncertainty of being required to relitigate this matter in State Court, particularly now that approxi-

mately nine years have passed since the death of Leong Chong.

IV.

Plaintiffs are entitled to injunctive relief protecting them from the possibility of relitigating this matter as a matter of law. This Court is empowered to protect and effectuate its judgments under the All Writs Statute, 28 U.S.C. § 1651(A), which provides:

> **The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.**

Under the All Writs Statute federal courts are empowered to enjoin a party from attempting to relitigate a matter in state court that has been finally determined by the federal court. *Texas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263, 1266 (5th Cir. 1969). *See Bank of Heflin v. Miles*, 621 F.2d 108 (5th Cir. 1980); *Seaboard Coast Line R. Co. v. Union Comp Corp.*, 613 F.2d 604 (5th Cir. 1980); *Southwest Airlines v. Texas International Airlines*, 546 F.2d 84 (5th Cir. 1977).

Furthermore, the Anti Injunction Act, 28 U.S.C. § 2283 in no way prohibits the enjoining of relitigation in state court of a matter finally determined in federal court. In fact, such injunctive relief is specifically allowed under the relitigation exception to the Act, which permits a federal court to enjoin a state court action "where necessary in aid of its jurisdiction or to protect or effectuate its judgments." *Parsons Steel, Inc. v. First Alabama Bank, et al.*, — U.S. — 44 U.S.L.W. 4144 (January 27, 1986).

In three district court cases, the Defendant Mr. Musslewhite has been permanently enjoined from attempting to relitigate in the courts of the State of Texas actions originally brought in behalf of foreign claimants in federal court and finally determined under the doctrine of *forum non conveniens*. *In re OCEAN RANGER*, Multidistrict Litigation Docket No. 508, Section C, Minute Entry dated August 14, 1985, *appeal pending* (a copy of which is attached as Exhibit "A"); *Sherrill v. Brinkerhoff Maritime Drilling*, Nos. C-82-0836 WWS and C-82-2565 WWS, N.D. Cal.; Findings of Fact and Conclusions of Law, Injunction and Final Judgment, January 31, 1986, *appeal pending* (a copy of which is attached as Exhibit "B"); *Texaco v. Benton Musslewhite, et al.*, C. A. No. S-85-168-CA, E.D. Tex. Injunction February 28, 1986 (a copy of which is attached as Exhibit "C"). Each of these cases present a situation essentially identical to the situation here and in each instance the district court granted permanent injunctive relief to prevent the litigation in state courts of claims finally dismissed under the doctrine of *forum non conveniens* by a federal court. These cases mandate the entry of permanent injunctive relief in this case, for to do otherwise would allow the total disregard of a final judgment of this Court.

WHEREFORE, PREMISES CONSIDERED, Exxon Corporation and Esso Tankers, Inc. respectfuly request their Motion for Summary Judgment be granted and that the Defendants Chick Kam Choo and her attorneys, Benton Musslewhite and Joseph C. Blanks be permanently enjoined from prosecuting or commencing any causes of actions or claims in the State of Texas or any other states which seek to relitigate any of the issues decided in Civil Action

No. H-78-477 regarding the wrongful death of Leong Chong which occurred aboard the tanker ESSO WILHELMSHAVEN on or about March 24, 1977 in Singapore, and that the Plaintiffs receive their reasonable attorneys' fees and costs and such other relief as may be just.

Respectfully submitted,

By: .....

James Patrick Cooney
Attorney in Charge
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380
Attorney for Plaintiffs,
Exxon Corporation and
Esso Tankers, Inc.

OF COUNSEL:

RAYSTON, RAYZOR, VICKERY & WILLIAMS

VERIFICATION

STATE OF TEXAS)
)
COUNTY OF HARRIS)

Before me, the undersigned authority on this day personally appeared James Patrick Cooney, who being duly sworn on oath says: "I am a member of the firm of Royston, Rayzor, Vickery & Williams and attorney in charge for the Plaintiffs. I have read the foregoing Motion for Summary Judgment and Application for Permanent Injunctive Relief and know the contents thereof and the same are true and correct."

James Patrick Cooney

SWORN TO and SUBSCRIBED BEFORE ME, on this — day of ———, 1986.

Notary Public in and for
Harris County, TEXAS

NOTICE OF SUBMISSION

Please take notice that this Motion for Summary Judgment and Application for Permanent Injunctive Relief will be submitted to the Court for its consideration on Monday, the — day of ———, 1986.

CERTIFICATE OF SERVICE

I hereby certify that on this — day of ———, 1986, a true and correct copy of the foregoing Motion for Summary Judgment and Application for Permanent Injunctive Relief was mailed to Joseph C. Blanks, P.C., 1119 First Texas Building, 4717 Orleans, Beaumont, Texas 77701, and Benton Musslewhite, Esq., 609 Fannin, Houston, Texas 77002, by CERTIFIED MAIL, RETURN RECEIPT REQUESTED.

Of Royston, Rayzor, Vickery
& Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORPORATION, ET AL.	)	CIVIL ACTION
	)	NO. H-86-606
vs.	)	
	)	(Filed May
CHICK KAM CHOO, ET AL.	)	14, 1986)

RESPONDENTS' RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND APPLICATION FOR PERMANENT INJUNCTIVE RELIEF

COME NOW Respondents CHICK KAM CHOO et al. and file their response to the Motion for Summary Judgment and Application for Permanent Injunctive Relief of Petitioners EXXON CORP. and ESSO TANKERS, INC. in the above styled and numbered cause, showing the Court:

Petitioners seek by way of a permanent injunction to prevent the Defendants and their attorneys from relitigating the issues finally determined in Civil Action No. H-78-477 in which a Final Judgment was entered by United States District Judge Gabriel McDonald on July 31, 1980. They insist that there is no genuine issue of material fact. Moreover, Petitioners ignore the ruling of the United States Court of Appeals for the Fifth Circuit that this Court is without jurisdiction of this cause. That judgment resulted when they previously invoked the jurisdiction of this Court by the removal of cause No. 84-00125 from the 270th Judicial District Court of Harris County, Texas approximately two years ago. While accusing these Defendants of seeking two bites from the apple, Exxon and Esso are doing precisely that themselves.

The Issues Finally Adjudicated in H-78-477

Defendants urge the Court to review the Order of Dismissal upon which Petitioners predicate their prayer for injunctive relief. The Report of Magistrate Platter, adopted by Judge McDonald, granted summary judgment for the Petitioners herein as to the Jones Act, Death on the High Seas Act, Longshoremen's & Harbor Workers' Compensation Act, and arguably the General Maritime Law claims of these Defendants. The Court then exercised its discretion and declined to retain jurisdiction of the cause, dismissing the remaining claims under the doctrine of *forum non conveniens.*

The only causes of action which C.K. Choo et al. are barred from relitigating are those on which summary judgment was entered. As to what those issues are, there is no genuine issue of material fact. Respondents raise no objection to the Court entering an order that precludes relitigation of those causes of action, but note that as to those issues, no controversy exists because no such claims are raised in the Harris County cause.

Respondents vigorously oppose, however, any effort to prevent them from pursuing their wrongful death claims against Exxon and Esso. Those causes of action were clearly not adjudicated in an earlier proceeding, except to the extent of a ruling by the Court of Appeals that this Court is without subject matter jurisdiction over them. The only ruling by the District Court pertaining to those causes of action was its refusal to retain jurisdiction based on *forum non conveniens.*

The refusal of a federal Court to retain jurisdiction in a case involving *forum non conveniens* has no *res ju-*

dicata effect in a later proceeding. To become eligible for *res judicata* effects, a judicial action need achieve a minimum quality, i.e., the judgment must be valid, final, and on the merits. 18 C. WRIGHT, A MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4427, p. 269 (1975 & Supp. 1985). The judgment on which Petitioners rely is valid and it is final, so far as it goes. But the judgment is manifestly not a ruling on the merits of the Texas or Singapore law claims. Nor does it appear to be a ruling on the general maritime law claims.[1] The initial dismissal of the above claims was on grounds that did not go to the merits of the claims. Moreover, it was not intended to preclude a second action. Clearly, Judge McDonald's order contemplated a second action in a non-federal forum.

No Bar to Relitigating Claims Dismissed for *Forum Non Conveniens*

Like a dismissal for want of justiciability, want of jurisdiction, or mootness, a dismissal for *forum non conveniens* does not constitute a final adjudication on the merits. It is frivolous to contend that such a determination precludes a second action on the same claim. *See Payne*

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[1] The Report of Magistrate Platter was ambiguous as to the general maritime law claims. The Report discussed the Jones Act, DOHSA, and L&HWCA claims individually. It concluded that Plaintiffs failed to state a claim under any of the three theories. All discussion of general maritime law was in conjunction with Texas statutes and other claims strictly in the context of a maritime *forum non conveniens* analysis. The District Judge disposed of the general maritime law claims by summary judgment, however, and did not enumerate the claims dismissed under the doctrine of *forum non conveniens*.

v. Panama Canal Co., 607 F.2d 155, 158 (5th Cir. 1979) (dismissal of prior action as moot, without prejudice); *Continental Casualty Co. v. Canadian Universal Insur. Co.*, 605 F.2d 1340, 1343 (5th Cir. 1979), *cert. denied* 455 U.S. 929 (vacation of prior judgment for want of justiciable controversy was for want of jurisdiction).

The trial court decided only that, as a matter of discretion, it would not hear the case. The grounds for that decision were, first, that U.S. law did not apply under federal maritime choice of law rules; and, second, that the U.S. District Court for the Southern District of Texas was an inconvenient forum for trial of the cause. Under the doctrine of direct estoppel, the two above *issues* might be precluded from being reopened in a second action, even though the *claims* can be renewed in a second action that covers the defects of the first. 18 C. WRIGHT, A MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4418, p. 171 (1975 & Supp. 1985).

"Dismissal on *forum non conveniens* grounds does not establish claim preclusion; ordinarily it cannot work issue preclusion as to other courts because the convenience issues are intrinsically different, but issue preclusion is appropriate if the issues remain the same." *Id.*, § 4436, p. 346.

The *res judicata* effect of Judge McDonald's judgment, at least as regards the Texas or Singapore law claims, is the preclusion of two issues: first, choice of foreign law under federal maritime jurisdiction; and second, that jurisdiction will not be exercised by this federal forum under *forum non conveniens* rules.

Petitioners are therefore barred by the *res judicata* principle of direct estoppel from seeking relief in this Court. Their insistence that this Court exercise jurisdiction contradicts the decision they won from Judge McDonald, and the ruling of the Court of Appeals that this Court is without jurisdiction over this cause.

In effect, Petitioners urge this Court to impose upon the Courts of the State of Texas a doctrine foreign to Texas law and a determination that was purely discretionary with Judge McDonald. Clearly, a Texas Court is not bound by that decision. This is so because dismissals for *forum non conveniens*

> involve deliberate refusals to decide the substantive issues presented. No apparent reason exists to justify forfeiture of the underlying claims upon a mistaken choice of tribunal. As previously suggested, then, a Court that orders dismissal on these grounds should not have any discretion to direct that the dismissal will preclude a second action on the same claim.

18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4436, p. 347 (1975 & Supp. 1985), citing RESTATEMENT SECOND OF JUDGMENTS § 20, comment d (1981). That is, however, precisely the result Petitioners seek: a ruling that the initial dismissal of this cause in federal court precludes a second action on the same claim in state court.

In an analagous situation, although with the relative positions of the state and federal courts reversed, the Supreme Court held that "a prior state court dismissal on the grounds of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power

vested in him by Congress to rule upon a motion to transfer under § 1404(a)." *Parsons v. Chesapeake & Ohio Railway Co.*, 375 U.S. 71, 73-74 (1963).[2]

The Supreme Court noted that *forum non conveniens* analysis under state law was in many respects similar to the considerations applied by a federal court in ruling on a § 1404(a) motion.

> The discretionary determinations of both the state and federal courts in this case required, to be sure, evaluations of similar, but by no means identical, respective criteria. However, since the material facts underlying the application of these criteria in each forum were different in several respects, principles of *res judicata* are not applicable to the situation presented here.

Parsons, 375 U.S. at 72-73.

The considerations discussed by the Court "no more than illustrate the many variables which might affect the exercise of discretion by a state court, as contrasted to a federal court, in any given case. Since different factual considerations may be involved in each court's determination . . ." the Court held the prior dismissal for *forum non conveniens* did not compel the second court to decline jurisdiction. *Id.* at 73.

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[2] The Plaintiffs, dismissed by the state court on the ground of *forum non conveniens*, refiled the same claim, in the same city, in federal court. The district judge denied Defendants' motion to transfer the cause to the out of state forum implicitly approved by the state court. The Court of Appeals issued a writ of mandamus directing the transfer. 307 F.2d 924 (7th Cir. 1962). The Supreme Court reversed the Court of Appeals.

No apparent reason exists to require an opposite result in this cause, even though the positions of the courts are reversed. The Texas court is no more bound by this Court's exercise of discretion than was the federal court in *Parsons* bound by the state court's discretionary refusal to exercise jurisdiction.

Indeed, even in actions prosecuted solely in the federal system, courts have refused to preclude relitigation of the ***forum non conveniens*** issue in actions refiled in a different district. One decision emphasized what is significant in this cause: that the first court decided only that, as a matter of discretion, it would not hear the case; it did not decide the convenience factors that were relevant in a different forum. *Mizokami Bros. v. Mobay Chemical Co.*, 660 F.2d 712, 715-17 (8th Cir. 1981). *But see Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3rd Cir. 1977).

Without waiving their motion to dismiss for lack of jurisdiction, the Defendants urge the Court to deny the motion for summary judgment of Petitioners and deny them the injunctive relief sought for the reason that there is no justification for denying the Plaintiffs in cause No. 84-00125 from pursuing those causes of action not subject to the summary judgment of this Court. Because the dismissal for *forum non conveniens* by this Court was discretionary and did not preclude relitigation in a nonfederal forum, that ruling has no *res judicata* effect and does not bar prosecution of the unlitigated claims in State court.

WHEREFORE, PREMISES CONSIDERATED, Respondents pray the Court deny the motion for summary judgment of Petitioners, dismiss this cause for lack of

jurisdiction, and grant Respondents all other relief to which they are entitled, including costs and attorneys fees.

Respectfully submitted,

/s/ Joseph C. Blanks, P.C.
1119 First Texas Building
470 Orleans
Beaumont, Texas 77701
(409) 833-2249
Texas Bar No. 02456770

CERTIFICATE OF SERVICE

A true copy of the above has been sent to all attorneys of record May 13, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EXXON CORPORATION AND ESSO TANKERS, INC.	)	
vs.	)	
CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEONG CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN, BENTON MUSSLEWHITE and JOSEPH C. BLANKS	)	CIVIL ACTION NO. H-86-606 (Filed May 15, 1986)

INJUNCTION AND FINAL JUDGMENT

The Motion for Summary Judgment and Application for Permanent Injunctive Relief of Exxon Corporation and Esso Tankers, Inc. for injunctive relief to enjoin Chick Kam Choo and her attorneys of record, Benton Musslewhite and Joseph C. Blanks, Defendants, from any attempts to relitigate the issues finally determined in Civil Action No. H-78-477 in any pending or subsequent State Court proceeding having come on to be heard, and it appearing that the Defendants are attempting to relitigate issues previously decided by this Court in Civil Action No. H-78-477 in Cause No. 84-00125 in the 270th District Court for Harris County, Texas, and that such relitigation will cause irreparable damage to the Petitioners by requiring them to relitigate issues that have been finally decided and are now precluded, it is

ORDERED that Chick Kam Choo and her attorneys, Benton Musslewhite and Joseph C. Blanks be and are hereby permanently enjoined from prosecuting or commencing any causes of action or claims against Exxon Corporation and/or Esso Tankers, Inc. in the courts of the State of Texas or any other state, and in particular Cause No. 84-00125 pending in the 270th District Court of Harris County, Texas, arising out of or related to the alleged wrongful death of Leong Chong, which occurred onboard the Tanker ESSO WILHELMSHAVEN on or about March 24, 1977, in Singapore. This Injunctive Order is binding upon and applies with equal force to the Defendants, their agents, servants and upon those persons in active consent or participation with them.

Further ORDERED, that the Plaintiffs recover their reasonable attorneys' fees as subsequently determined by the Court along with their costs.

SIGNED at Houston, Texas, this 15th day of May, 1986.

/s/ Norman Black
United States District Judge